Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-6580

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL-CIO,

Petitioner

v.

TEXACO, INC.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Operative Plasterers and Cement Masons International Union Local 685, AFL-CIO (herein the union or Plasterers) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 15, 1973.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 594, 82 LRRM 2384 (Appendix C). The opinion of the District

Court is reported at 343 F.Supp. 267 (Appendix D). A companion case, National Labor Relations Board v. Lafayette Building and Construction Trades Council, AFL-CIO et al, is reported at 445 F.2d 495. (Appendix F) The Recommended Decision of the Trial Examiner and decision of the National Labor Relations Board is reported as Lafayette Building & Construction Trades Council, AFL-CIO et al, 176 NLRB 979 (Appendix E).*

## JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1973 (Appendix B). The jurisdiction of this Court rests on 28 USC 1254 (1). Time for filing was extended to November 14, 1973 (Appendix A)

## QUESTIONS PRESENTED

1. Whether the findings and decision of the National Labor Relations Board that the Union had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (29 USC 158(b)(4)(ii)(B)) are conclusive and res adjudicata as to the liability of the union in a subsequent proceeding for damages by the charging party, Texaco, Inc., not directly affected by the actions, under Sec. 303 of the Taft-Hartley Act, 29 USC 187.

2. Whether the District Court erred in granting a partial motion for summary judgment based on the findings of the National Labor Relations Board as to the liability of defendant union.

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* In accordance with Rule 39 one appendix has been attached but divided into nine part serially lettered A through I.

## STATUTE INVOLVED

Section 303 of the Labor-Management Relations Act (29 USC 187) and the section to which it refers, Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (29 USC 158 (b)(4)(ii)(B) and its proviso are at the statutory matrix of the controversy. Section 303 provides:

> "Sec. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Section 8(b) provides:

> "It shall be an unfair labor practice for a labor organization or its agents -
>
> (4) . . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either

case an object thereof is: . . . .

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided. That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . "

## NATURE OF REQUEST

This is a request for review of a decision of the United States Court of Appeals for the Fifth Circuit affirming per curiam the Judgment of the District Court for the Western District of Louisiana granting a motion for partial summary judgment and holding that a prior decision of the National Labor Relations Board, enforced by the Fifth Circuit that the union had violated Section 8(b)(4)(ii)(B) by threatening Dubois, a material supplier of Dresser Engineers, a subcontractor of Texaco, was res adjudicata on the issue of liability in the concurrent suit for damages by Texaco under Section 303. Trial was held only on the issue of damages with an award in excess of $24,000.00 (Appendix B, C and D)[1/]

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1/ The District Court in its final judgment noted: "1. This court, or a jury unhampered, might not have found as the Board did that Delahoussaye threatened Dubois

(continued on next page)

## STATEMENT OF THE CASE

Texaco, Inc. (herein Texaco) owns and operates a large processing and refining plant at Erath, La., some 25 miles south of Lafayette, La., known as the Henry Gas Plant. Texaco in early summer 1967 entered into a cost plus contract with Dresser Engineering, Inc. (herein Dresser), a non-union general contractor in the building and construction industry from outside the State for construction of a substantial addition to the plant. Dresser in turn contracted with Dubois Concrete Works, Inc. (herein Dubois), a small family held corporation at Abbeville, La., some 10 miles west of the plant, to supply ready mixed concrete, according to its specifications, on a fixed price per cubic yard basis. A union unrelated to the Plasterers, Local 106 Plumbers and Pipefitters of Lake Charles, La., established a picket line at the Dresser job site in Erath, La., around August 9, 1967 and continued picketing from then on. After delivering concrete in its own trucks during June and July, Dubois on the appearance of the picket sign ceased making delivery in its own trucks and thereafter delivered the mixed concrete at its plant site in Abbeville, into trucks leased by Dresser, referred to as "batching out". On September 7, 1967, Dubois refused to deliver any more concrete to Dresser informing Dresser "In view of what happened last night, I can no longer give you any

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1/ Continued

with an object of forcing or requiring Dubois to cease doing business with Dresser and that by such conduct respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act." (Appendix D, p. 14, fn. 1) 343 F. Supp -. 272 fn. 1.

concrete". (Appendix E, p. 28) Allegedly on August 29, 1967, the exact date unknown, respondent Plasterers through the business agent Delahoussaye, had a conversation with Dubois which the Board in overruling its Trial Examiner found constituted a threat. (Appendix E 20, 27-33) The Board made no finding that the alleged threats were responsible for Dubois ceasing batching and selling to Dresser.

On October 19, 1967, Texaco filed charges against petitioner and Lafayette Building & Construction Trades Council, AFL-CIO (herein The Council) alleging violation of Section 8(b)(4) of the Act. No charges were ever filed by Dubois or Dresser. On November 20th, the Board issued a consolidated complaint alleging both respondents had violated Section 8(b)(4)(i)(ii)(B), 29 USC 158(b)(4)(i)(ii)(B). Concurrently a petition for injunction pursuant to Section 10(1) of the Act, 29 USC 160(1), for a temporary injunction was filed in the United States Court for the Western District of Louisiana to restrain conduct of the respondents (Case No. 13,375). Both respondents, Plasterers and the Council, immediately on November 30, 1967, entered into a stipulation, approved and ordered by Judge Putnam of the District Court, providing that respondents including petitioner here will not "threaten, coerce or restrain Dubois, Texaco, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Dubois, Texaco, or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of, or to cease doing business with Dresser". (Appendix G) This Order remained in effect until the final disposition of the proceedings before the Board and was complied with in full by the respondents. Prior to trial, the Regional Director for the

Fifteenth Region on March 14, 1968, approved settlement agreements in which the Council and the Plasterers agreed to cease and desist from the alleged conduct prohibited by Sec. 8(b)(4). (Appendix H)[2/] This agreement was lived up to by the Council and Plasterers and the Notices required were duly posted and distributed. Neither these settlements nor the Court agreement were ever violated. The Regional Director advised Texaco of the dismissal of the Complaint. (Appendix E p.25) Texaco declined to enter into the agreements of March 14, 1968 and on March 20, 1968 appealed the Regional Director's refusal to proceed further, and his approval of the settlement, to the General Counsel's Office in Washington, D.C. (Appendix I) Such appeal of Texaco is not required by the rules of the Board to be served or noticed to other parties and this curious document did not come into the possession of respondent Plasterers until the trial in September, 1968. The appeal of Texaco, which respondents were unable to answer for lack of notice, challenged the authority of the Regional Director to enter into the settlements, alleged that respondent Council had a history of unlawful conduct, referred to a previous reported case many years before, alleged that a climate of fear, unlawful activity, reign of terror, threats, shootings, bombings of automobiles belonging to the superintendent of Dresser at his residence; bombings of Texaco's property and of other local businessmen supplying Texaco or Dresser and mass picketing of Texaco's plant;

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2/ Only one is included in appendix. Both unions entered into identical settlements.

and, anonymous threats of violence "were the order of the day during this period for local businessmen who were supplying Texaco and its contractors." (Appendix I, p. 58) It referred to this suit, then pending, and the Complaint suggesting that Plasterers had threatened and carried out such threats inferentially by the acts enumerated. (Appendix I) No such matters were contained in the Complaint (Appendix E). This imaginative indictment of the Plasterers went unanswered and nothing in it was ever suspected, much less proven with respect to the Plasterers.[3] On the

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[3] Plasterers union never engaged in any active dispute or picketing of Dubois, Dresser or Texaco. The only known dispute in the area up to October 17, 1967 was that of the unrelated union Local 106, Plumbers. The Council on October 17, 1967, a month and 10 days after Dubois stopped supplying concrete to Dresser, placed a picket sign on the hood of a parked automobile at a public road intersection leading to the plant and allowed it to remain for 2 or 3 weeks reading "We are protesting substandard wages and conditions of Dresser Engineers, Lafayette Building & Construction Trades Council". On the basis of the location of this picket line over one-quarter of a mile from the main gate of Texaco and the separate gates of the subcontractors, including Dresser, the Trial Examiner and the Board found a violation of 8(b)(4) by the Council. (Appendix E) There was no evidence that any of the 3 unions were acting in concert or in support of each other and the Trial Examiner so found specifically with respect to respondent Plasterers (Appendix E). The

(continued on next page)

basis of this appeals document the Appellate Division of the General Counsel's Office reversed its Regional Director's approval of the settlements and ordered trial. (Appendix E p. 25)

The Regional Director then reissued his original complaint. At the hearing in September, 1968, respondents by written motion again moved for approval of the settlements, which the Trial Examiner referred to the Board and the Board denied without opinion,after the close of the hearing (Appendix E p.26). The veteran Trial Examiner in his decision, after making specific credibility findings between the testimony of Dubois and Delahoussaye,

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3/ Continued

exaggerated allegations of violence, dynamiting, threatening phone calls, etc. if true, were never related to either respondent Council or Plasterers. On September 6th, the night before Dubois stopped all deliveries to Dresser, two vehicles owned by the superintendent of Dresser were dynamited at his home. Subsequently officers or members of Local 106 Plumbers were indicated and two convicted of this offense and sentenced to 20 years, without bond during appeal, reflecting the local climate. The convictions were reversed by the Supreme Court of Louisiana. State vs. Ray and Hayes, 259 La. 105, 149 So.2d 540 (1971). Officers and members, mostly Negroes, of Plasterers, if anything shared this fear. They were never suspected, investigated or accused of any such activity, except by the counsel for Texaco.

found that no threat was made by respondent Plasterers, concluding that "a fair preponderance of the credible testimony" failed to establish a violation of Section 8(b)(4) by Plasterers and that they had no dispute with any employer at Texaco or acted in concert with Local 106. (Appendix E p. 34). After exceptions by the General Counsel and Texaco, two members of the Board's panel reversed all of these findings and conclusions in a tortious chain of circuitous revolving findings and inferences. The third member would have approved the settlements in view of the minimal nature of the violations and absence of any pattern. (Appendix E p. 23). On petition for enforcement the Fifth Circuit Court enforced the Board's decision. NLRB vs. Lafayette Bldg. & Constr. Trades Council, (Appendix F)

The District Court suspended proceedings in the Section 303 damage suit pending conclusion of the NLRB proceedings. The Labor Board decision was rendered on June 24, 1969. Texaco then filed the motion for partial summary judgment in this proceeding on December 9, 1969 and after enforcement of the Labor Board order by the Circuit Court in its decision rendered July 1, 1971, the court granted the motion for summary judgment as to liability against defendant Plasterers on September 3, 1971. (Appendix D p. 10)

## THE DECISION OF THE COURT OF APPEALS

The Court decided the matter on its summary docket without argument on January 15, 1973, holding that the decision of the National Labor Relations Board that the union had committed an unfair labor practice in violation of 8(b)(4)(ii)(B) of the Act is res adjudicata as to liability in this action at

law for damages under Section 303 of the Labor Management Relations Act. It mentioned but did not discuss its previous decision in NLRB vs. Lafayette Building & Construction Trades Council, 445 F.2d 495 (CA 5, 1971).

The Court noted "applying res adjudicata in this case may seem harsh, especially since there are some definite differences between Board and court proceedings, we feel the affirmance is compelled by the existing case law in this circuit." (Appendix C p. 8) It relied on, without discussing, the authority of Painters vs. Edgewood Construction Co., 416 F.2d 1081 (CA 5, 1969) and the case following it, H. L. Robertson & Assoc. Inc. vs. Plumbers Local 519, 429 F.2d 520 (CA 5, 1970); and affirmed the judgment for Texaco on the motion for partial summary as to liability of defendant Plasterers after issue was joined.

## REASONS FOR GRANTING THE WRIT

### I.
### THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT

There is substantial and confusing conflict between the decisions of the Fifth and Ninth Circuits on the one hand and the Sixth Circuit on the other hand. Additional confusion exists in apparent unreconciled conflicting decisions on the same doctrines within the Fifth Circuit itself and parallel decisions of the Sixth Circuit itself. This is compounded by alternate application of either of the related doctrines of collateral estoppel or res adjudicata. To further obscure practitioners, the application of either doctrine to damage suits under Section 303 based on findings by the Board in unfair labor practice proceedings resting on Section 8(b)(4) apparently conflicts with the principles

enunciated in this Court's decision in Longshoremen & Warehousemen's Union vs. Juneau Spruce Corp., 342 U.S. 237, and two long standing decisions of the 6th Circuit on which this Court denied certiorari, United Brick & Clay Workers vs. Deena Artware, 198 F.2d 637 (CA 6, 1952), cert. den. 344 U.S. 897, rehearing den. 344 U.S. 919; NLRB vs. Deena Artware Inc., 198 F.2d 645 (CA 6, 1952), cert. den. 345 U.S. 906.

The Fifth Circuit in the instant case rested its decision squarely on its earlier case, the first to apply the doctrine of res adjudicata in this type of case. Cf. Painters District Council vs. Edgewood Construction Co., 416 F.2d 1081 (CA 5, 1969). H. L. Robertson & Assoc. Inc. vs. Plumbers Local Union 519, 429 F.2d 520 (CA 5, 1970) followed. Both cases hold that the findings of a final decision of the Labor Board finding acts contrary to Section 8(b)(4) of the National Labor Relations Act should be accorded the doctrine of res adjudicata in subsequent proceedings for damages under Section 303 of the Taft-Hartley Act. Robertson allowed attorneys fees as part of the damages. In neither case were writs of certiorari applied for. The court then seemed to digress in Rachal vs. Hill, 435 F.2d 59 (CA 5, 1970), cert. den. 403 U.S. 904. There the district court had granted summary judgment in a civil action for damages for violation of the Security & Exchange Act of 1934 and the Security Act of 1933 based on the findings in a prior injunction action brought by the Security & Exchange Commission that defendant had violated the securities law. On appeal, the Fifth Circuit held that the doctrine of collateral estoppel did not preclude relitigation of the issues in the civil actions brought by strangers to the injunction action

despite factually identical issues. The court based its reversal of the summary judgment on the principle that the issue of liability had been decided by the district court sitting without a jury in the SEC injunction proceeding and that the parties in the subsequent civil proceeding for damages were entitled to a trial by jury as a matter of right under the 7th Amendment to the Constitution and Rule 38 although the defendants had not yet demanded a jury trial.

The 9th Circuit in Paramount Transport Systems vs. Chauffeurs, Teamsters & Helpers Local 150 etc., 436 F.2d 1064 (CA 9, 1971) applied the doctrine of collateral estoppel to the findings of a Trial Examiner finalized by failure to file exceptions, to the subsequent damage suit proceeding under Section 303.

The 6th Circuit on the other hand in Riverton Coal Co. vs. United Mine Workers, 453 F.2d 1035 (CA 6, 1972), cert. den. 407 U.S. 915, refused to follow previous decisions of the National Labor Relations Board as controlling in damage actions under Sec. 303, at 453 F.2d 1042 citing this Court's opinion in Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra; its two Deena Artware cases, supra; and Old Dutch Farms Inc. vs. Milk Drivers, 281 F.Supp. 971 (ED NY 1968). Most recently the same Circuit in International Wire vs. Local 38 IBEW, No. 72-1688, decided March 20, 1973, ___F.2d.___,[4/] (CA 6, 1973) without discussing its previous Riverton

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[4/] Cert. applied for June 18, 1973 No 72-1707 Denied. October 9, 1973 84 LRRM 2422

decision, the Fifth Circuit decisions, or its previous Deena Artware decisions, applied the doctrine of collateral estoppel in affirming a summary judgment to bar an action for damages under Section 303 after the decision of the N.L.R.B. finding that the defendant had not engaged in unfair labor practices contrary to 8(b)(4). A district court in the 6th Circuit has followed the rule as enunciated in that circuit by Riverton Coal vs. United Mine Workers of America, supra, Gillespie vs. Pipefitters Local 120 (DC ND Ohio, 1971), 81 LRRM 2538. Other district courts in other circuits have refused to follow either the doctrine of res adjudicata or collateral estoppel to findings by the NLRB of violations of Section 8(b)(4) in subsequent 303 damage suits; Old Dutch Farms, Inc. vs. Milk Drivers Local 584, supra. See also cases distinguished by Painters District Council vs. Edgewood at 416 F.2d at 1085.

II.

THE APPLICATION OF THE DOCTRINE TO SHORT CIRCUIT TRIAL OF CIVIL DAMAGE SUITS BASED ON DECISIONS OF THE NLRB IS IN ERROR.

This decision and the earlier case on which it is bottomed, applying the doctrine of res adjudicata to Section 303 damage suits on the basis of previous findings by the NLRB, we suggest, results from a misinterpretation of this Court's decision in United States vs. Utah Construction & Mining Co., 384 U.S. 394 (1966) and a failure to properly weigh the previous decision of this Court in Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra, and to properly appraise the long recognized holdings in United Brick & Clay Workers vs. Deena Artware, Inc., supra, and NLRB vs. Deena Artware, Inc., supra. The Circuit

Court, as did the District Court, rested its decision squarely on its earlier case of Painters District Council vs. Edgewood Contracting Co., supra, although it also cited H. L. Robertson & Assoc. Inc. vs. Plumbers Local 519, supra, which in turn was decided on the authority of the same case. Painters District Council, a final decision by the Board upon a charge filed by Edgewood, the plaintiff, in the 303 suit had found a violation of Sec. 8(b)(4). The court relying on the language of this Court in United States vs. Utah Construction Co., supra, at 384 U.S. pp. 421-422, (416 F.2d at 1083) found that the Board was acting in a judicial capacity and that the issues were properly before the agency and the parties had a full and fair hearing. It also cited from Professor Davis' Treatise on Administrative Law.

> "The unsound idea that res judicata does not apply to administrative determinations is gradually being replaced by the sound idea that res judicata properly applies to some administrative determinations and that degrees of relaxation of res judicata are often appropriate. The movement is toward a recognition that the reasons behind the doctrine of res judicata are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others." 2 Davis Administrative Law #18:12 (Supp. 1965) (416 F.2d at 1084)

It distinguished the Deena Artware cases, supra, solely on the basis that, although the findings were directly contradictory, the cases reached the Court of Appeals contemporaneously and held that

". . . inconsistent fact findings on the same issue is a different problem from whether the courts lack power to prevent relitigation of the same issue in the first instance."

It then went on to find that the fact that an unfair labor practice proceeding is not a condition precedent to a civil suit and that the remedies are independent, does not deny the court the power to apply the doctrine of res adjudicata. (416 F.2d at 1085)

The court mentions Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra, but failed to note the holding of this Court that "the fact that the two sections have an identity of language and yet specified two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other". (242 U.S. at p. 244). The court also failed to note the radical distinction between the nature of the proceeding and statute in United States v. Utah Construction & Mining Co., supra, and the remedy procedure and provisions of the statute in Sec. 8(b)(4) and Section 303. In Utah, this court was construing a particular statute, a suit under the Tucker Act and the finality of the administrative fact findings of the dispute clause in a contract under the provisions of the Wunderlich Act of 1954. (384 U.S. at 399 Fn. 3) These Acts specifically provided that all disputed questions of fact arising under the contract would be decided by the contracting officer and this court had previously held in interpreting the Act that the review was limited to the administrative record, 384 U.S. at p. 420. The decision properly rested on the agreement of the parties as the court noted and then discussed "general principles of collateral estoppel", 384 U.S.

at p. 421, but did not in any way indicate that such remedies could be applied in the distinctly separate types of proceedings, remedies and forums of the Board and the Courts provided by Section 8(b)(4) of the National Labor Relations Act, as amended, and Section 303 of the Taft-Hartley Act.

In relying on the above quotation from Davis' Treatise on Administrative Law, the Court failed to note that Davis had qualified his quoted suggestion by adding that the use of the doctrine should be avoided if there was any reason to believe there was not an adequate presentation before the agency, and secondly, that the stated doctrine should be relaxed in areas of "changing law, changing policy, changing facts, strong public interest in avoiding perpetuation of error or undesirable policy in some concrete context, need for equal treatment of parties whose circumstances are the same, and other subtle or complex factors in various combinations'. 2 Davis Administrative Law #18.12 p. 626. Davis, of course, was not speaking specifically to the clear congressional intended distinctions in the remedy and law of the two sections of this Act as early indicated by this court in the Juneau Spruce case. See also Section III infra.

## III.

## THE TWO SECTIONS HAVE A DIFFERENT PURPOSE WITH DIFFERENT RULES OF LAW, PROCEDURE AND REMEDY APPLICABLE AND THE APPLICATION OF THE DOCTRINE OF RES ADJUDICATA DENIES DEFENDANT SUBSTANTIAL DUE PROCESS AND OTHER RIGHTS UNDER FEDERAL LAW AND PROCEDURE.

A.

As this Court has pointed out, the Board is acting as a public agency in the public interest, not in the interest of any private person or group and is chosen as the instrument to assure protection from the described unfair labor practice in order to remove obstructions to interstate commerce; Amalgamated Utility Workers vs. Consolidated Edison, 309 U.S. 261 (1940). It does not create an administrative remedy for private wrongs, 309 U.S. 265-266, 268. It does not provide a private administrative remedy and provides no private rights to the victims of unfair labor practices. The only recognition of existence of private rights is within the public interest. In this respect the Labor Board is constituted to adjudicate the matters before it in a manner different from most other administrative agencies. Amalgamated Utility Workers vs. Consolidated Edison, supra; Local 283 vs. Scofield, 282 U.S. 205, (1965); Concrete Materials of Georgia vs. NLRB, 440 F.2d 61 at 67, (CA 5 1971). In the proceeding before the Labor Board, the dispute is between the Regional Director and the charged party and the only interest of the charging party, (Texaco here,) is to participate to the extent to see that his interest in the dispute will be considered. Concrete Materials of Georgia vs. NLRB, supra. Hence it is clear that the parties to the two proceedings are entirely different. Conversely the remedy sought by the Board and applied is solely in the public interest and is in the nature of injunctive relief providing for corrective action by cease and desist orders and such affirmative relief as necessary, including particularly in 8(b)(4) cases notification to members of the Union and the public of compliance with the law. It is not a penalty.

29 USC 160 (a). When considering alleged violations of Sec. 8(b)(4) the Board is not concerned with the effect of such actions whether direct or incidental. The statute speaks in terms of motive, purpose and object with regard to the actions of the union, and whether such actions are severely damaging or completely ineffectual is immaterial. Ramey Construction Co. v. Local 544 Painters, 82 LRRM 2442 (CA 5, January 31, 1973); Moore Dry Dock (Sailors Union of the Pacific), 92 NLRB 547; Superior Derrick vs. NLRB, 287 F.2d 891 (1960); NLRB vs. Intl. Rice Milling, 341 U.S. 665 (1951); Houston Insulation Contractors Assn. vs. NLRB, 357 F.2d 182 (CA 5, 1966). The consequences may be disastrous to the other party but if the activity is primary and permissible it is not an unfair labor practice. On the other hand, the consequences, i.e. the damage to a party or other persons, may be inconsequential or actually beneficial but if the object is secondary regardless of the means, whether crude or sophisticated, it is prohibited by Sec. 8(b)(4) and the Board applies its remedy. Superior Derrick vs. NLRB, supra; Local 74 Carpenters vs. NLRB 341 U.S. 707 (1951); NLRB vs. Denver Bldg. Trades Council, 341 U.S. 675 (1951); IBEW vs. NLRB, 341 U.S. 694 (1951).

On the other hand, Sec. 303 specifically gives a private right of action to a private party for damages sustained, a penalty imposed on the offending defendant. The action is at law and to maintain such action, the party must be able to demonstrate injury to his business or property by reason of the violation, 29 USC 187 (a) and (b); United Brick & Clay Workers vs. Deena Artware, supra. The effect of the acts, i.e. the injury or damage, creates the cause of action at law with all the substantive rights that flow from

such action. This important difference is emphasized by contrast. Other acts of unions defined as unfair labor practices are not made "unlawful" and no act of an employer defined as an unfair labor practice is made "unlawful". Hence civil damage suits cannot be brought and the jurisdiction of the court is usually pre-empted by that of the National Labor Relations Board. Motor Coach Employees vs. Lockridge, 403 U.S. 271 (1971) and cases cited therein.

B.

The legislative history of the Act clearly demonstrates the distinction between the sections. Section 303's reference to boycotts was offered as part of the amendments by Senator Taft on May 8, 1947, 93 Cong. Rec. p. 4900, and again reoffered and passed on May 9, 1947, 93 Cong. Rec. pp. 5059-5060. This amendment contained Sec. 303 (a) except that it spelled out the provisions of Sec. 8(b)(4) rather than incorporating them by reference. It also contained the provisions of Sec. 303 (b). After Senator Pepper had pointed out that he had just noticed that the amendment had not only made it an unfair labor practice to engage in a boycott or jurisdictional strike but also had made it "unlawful", Senator Taft confirmed that the definition was the same and that the effect of making the acts unlawful was that a suit for damages can be brought for that kind of thing. 93 Cong. Rec. 5060, May 9, 1947. In reply to questions by Senator Pepper, Senator Ferguson pointed out "Therefore all the amendment would do, if adopted, would be to create a cause of action for damages which could be heard before a jury in a Federal court. Is that correct?" Mr. Taft: "That is correct". 93 Cong. Rec. 5061, May 9, 1947. Thereafter Senator Taft inserted after the word "unlawful" in Sec. 303(a) the

words "for the purpose of this section" in order to meet objections of other Senators, 93 Cong. Rec. 5061, May 9, 1947. Senator Taft in submitting the original bill to Congress in his Senate Report No. 105 on Senate Bill 1126, 80th Congress, pointed out that the bill in addition to making secondary boycotts and jurisdictional disputes unfair labor practices also provided that the Board may seek injunctive relief. Senate Report No. 105, 80th Congress, p. 7-8.

The House Conference Report by the managers of the bill after the passage of the Senate amendments makes it clear that there are three distinct remedies provided by the compromise bill ultimately passed in this form. (1) Unfair labor practice proceedings by the General Counsel in the usual form under Sec. 8(b)(4)(A)(B)(C) and (D) (pp. 42-44); (2) mandatory interim injunctive relief for these unfair labor practices under Sec. 10(1) reserving "to private parties of any other remedy they might have in respect to such activities" (p. 57), and (3) a special civil action for damages under the new Sec. 303 (p.67). House Conference Report No. 501 on HR 3020, June 3, 1947, 80th Cong. 1st Sess. See also remarks of Congressman Lesinski, 93 Cong. Rec. pp. 7495-7495, June 19, 1947.

C.

Defendant had it anticipated the court application of the doctrine could have demanded a jury. Either party to the damage suit action is entitled to the right of a trial by jury upon a request timely made or in the discretion of the trial judge at any time. 28 USC Rule 38, 39. United Brick & Clay Workers vs. Deena Artware, supra; see Senator Ferguson and Senator Taft's comments, 93 Cong.

Rec. 5061, May 9, 1947.[5] Since this is a civil action at law defendant had the right to demand trial by jury under the 7th Amendment and consequently had a substantive right to have the jury resolve disputed questions of fact and draw the inferences.[6] In the absence of the jury these functions fall to the judge in an action at law.

Have defendants unwittingly sacrificed such fundamental rights by waiving the jury prior to

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5/ Compare the language of Sec. 303(b) and the language in the Federal Employers Liability Act giving rights to injured railroad employees, 45 USC 51, and this court's comments on the right of trial by jury. Shultz vs. Pennsylvania RR Co., 350 U.S. 523; Bailey vs. Central Vermont RR Co., 319 U.S. 350.

6/ Although defendant here did not seek a jury originally, the decision in Painters vs. Edgewood (October 7, 1969) intervened between the time of defendant's answer, January 22, 1968, and the motion for summary judgment on December 9, 1969. After the plaintiff obtained the summary judgment and was sure of winning against Plasterers, it substantially changed the posture of the case by dismissing the joint defendant Lafayette Bldg. Trades Council found by the Board to have actually engaged in picketing and to have an active dispute with Dresser, individual defendant Delahoussaye, and one count of the complaint as to defendant Plasterers (Appendix G).

any court of appeals applying the doctrine of res adjudicata or collateral estoppel to these types of cases and placing the matter in the hands of an experienced district judge familiar with the different rules of evidence and procedure in actions at law before the development and enunciation of the rule for the first time in Painters vs. Edgewood, supra, on Oct. 7, 1969. Were these substantial rights lost in deference to an agency following a different weight of the evidence rule with a different object in mind, i.e. the protection of the public by injunctive type cease and desist orders against conduct burdening commerce.

This case demonstrates the prejudicial difference in inferences that may be drawn by different finders of fact, with a different purpose. The Board's Trial Examiner found with respect to respondent Plasterers that "it had no quarrel with any employer at Texaco and it is nowhere shown that it acted in concert with Local 106 or in response to any requests from Local 106", including Dresser and Dubois, and that Plasterers were not in violation of 8(b)(4) (Appendix E p. 34). In the complaint the General Counsel had alleged that the Plasterers and Council had a labor dispute with Dresser in connection with the work being performed at the Henry Gas Plant (Texaco). (Appendix E p. 27) The Board, two members of the panel acting, overruled its examiner and found on the evidence considered as a whole, "the conduct of Respondent's agents . . . clearly suggests that there was in fact a dispute between respondent Plasterers and Dresser, although perhaps not as direct or active a dispute as that existing between Dresser and Local 106 Plumbers". They then went on to find that under the circumstances respondent Plasterers acted in aid of Local

106's dispute with the primary employer Dresser.[7] (Appendix E pp. 20-21) No such allegations were contained in the complaint. Local 106, if acting in concert with Plasterers, was likewise guilty of a violation of 8(b)(4) but they were not named or charged. There was no evidence direct or indirect in the record to substantiate such findings. It rested solely on inference of an agency seeking to protect the public interest. The jury or the judge, like the Trial Examiner, a veteran of many year's service in passing on the evidence, logically could have made different findings and drawn different inferences. See the District Judge's comment Footnote 2, supra, page 3. Defendant Plasterers was substantially prejudiced by the Circuit Court's

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[7] This reversal was based solely on inferences, including inferences of participation with a union not a party, who was not shown to have taken any action with regard to Dubois. To arrive at these inferences the Board members had to ignore the credibility finding of its experienced Examiner and the contrary reasons for his refusal to deliver given by Dubois to construe "a threat". Both the Board and the Court ignored this Court's caveat in Universal Camera Corp. v. NLRB, 340 U.S. 474, and NLRB v. Walton Mfg. Co., 369 U.S. 404. The Board recirculated the circumstantial evidence, speculated and was not following the test of suits at law provided by Federal Rule of Civil Procedure 52(a) requiring affirmance of the trier of fact's findings unless "clearly erroneous". The Circuit Court, after rejecting this suggestion in NLRB vs. Lafayette Bldg. & Constr. Trades

(continued on next page)

doctrine, as applied in this case since the district judge, and presumably the jury if allowed, were not free to make their own findings and inferences from the evidence. Although this Circuit recognized the importance of this distinction in other administrative proceedings, it denies it in Section 303 damage suits vis-a-vis Section 8(b)(4) Labor Board injunctive type remedies. Compare Rachal vs. Hill, supra. The distinctive need of the Congressionally intended two forums, one a public agency - a public protecting remedy without penalty, the other a private suit - a private reward for plaintiff, a harsh penalty for defendant, is clearly illustrated in the history of this case.

D.

The test with respect to the weight of the evidence and procedural rules for substantial justice to the parties are different with respect to the NLRB and the federal courts. The findings of fact, inferences drawn by the NLRB and its conclusions cannot be interfered with by the Circuit Court on petition to enforce or review "if supported by substantial evidence on the record as a whole", 29 USC 160(e)(f) and (g). On the other hand, the evidentiary test of findings by judges sitting without jury is the "clearly erroneous" rule, 28 USC Rule 52(a). The Board does, however, despite this court's caution in Universal Camera Corp. vs. NLRB, 340 U.S.474,

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7/ Continued

Council AFL-CIO et al, 445 F.2d 495, the companion case, we suggest, had a duty to reconsider it in the Section 303 appeal, now the subject of this writ.

as in this case frequently overrule its Trial Examiner. Thus an additional exposure is added to the defendant. More importantly, the Board in its position as an agency acting in the public interest and to protect its investigative processes and its witnesses from discrimination refuses to disclose in advance of trial the names or statements of witnesses and documents which may be pertinent to respondent's defense. 29 USC 161, NLRB Field Manual Sec. 10292.4; 10394.7-10394.11. Only the formal records are disclosed and the statements of witnesses after they have testified in accordance with the Jenks rule. 29 CAF 102.117, 102.118, NLRB Field Manual Sec. 10394.7. No witnesses, statements obtained by investigators of the Board, or records are available through pretrial discovery or interrogatories. Since the charging party later plaintiff in 303, is not a real party at interest the same difficulty is encountered, nor are they always fully informed of the material in the Board's files. Since some witnesses and material is never used this remains forever hidden from defendant's eyes.

As demonstrated above, the Regional Director, the true party, is only concerned in an 8(b)(4) case with "the object or the purpose of the activity", not with its effectiveness vel non or resultant damages. Issues relating to the charging party, possible plaintiff in the civil damage suits, conduct which may have induced, provoked or aggravated the alleged unlawful activity of respondent are not the concern of the Board. Yet the question of actions that create liability on the part of the respondent may be so entwined that issues of effect, causation and damages that they become for evidentiary purposes inseparable and material to test the "unlawfulness" of defendant's action in the civil damage suit,

questions that should properly be submitted to the judge or jury. Since any person may file a charge, even one unaffected under Sec. 10(b), 29 USC 160(b), the real parties immediately affected by the actions of the respondent are often not even nominal parties to the case. The Board joins no other parties except respondents charged with unfair labor practices and no method is provided for respondent to bring all affected parties into the proceedings. Thus the respondent, made defendant in a subsequent damage suit, is deprived of its important procedural rights in the Federal Rules of Civil Procedure of pretrial discovery and interrogatories, cross claims or counter claims and interpleader of necessary parties; the disclosure of investigative material to which it would otherwise be entitled, the names of witnesses and since the Board limits its proof only to objective and may or may not call the charging party or other persons affected defendant is denied its rights of cross examination under Rule 43(b) of a true adverse party and his agents.[8/] In effect, by the Board protective rules, Respondent is fighting the battle against the

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8/ Respondent would have interpleaded Local 106, Plumbers and called for production of all Board records of its activity including charges dismissed, and the Board's statements of all Dubois and Dresser witnesses, particularly Mrs. Lifey Dubois, who did not testify in the NLRB proceeding had it been permitted to do so. Since the Board did not call all the persons it investigated, respondent assumes the risk if it calls them, of making them its witnesses, or using them without advance information about their statements.

other nominal party, on which depends the outcome of his subsequent civil damage suit, as to liability, with one hand tied behind his back.

IV.

DEFENDANT WAS DEPRIVED OF A FULL AND FAIR HEARING BY LACK OF OPPORTUNITY TO ANSWER TEXACO'S APPEAL FROM THE REGIONAL DIRECTOR'S APPROVAL OF THE RESPONDENT'S SETTLEMENT.

The rules of the Board and failure of Texaco by notification, to allow respondents to answer its appeal to the General Counsel (Appendix H) deprived petitioner Plasterers, then respondent, of an opportunity to answer the appeal and substantial due process. The Plasterers after immediately settling the 10(1) injunction suit, entered into a settlement agreement with the Regional Director after issuance of the complaint to abstain from all the alleged unfair labor practices and complied by posting the required notices to its members and others. This contained a non-admission clause. The Regional Director approved, finally disposing of the case. Under the Act, the sole discretion lies in the General Counsel whether to issue or proceed on a complaint (Sec. 3(d), 29 USC 153(d)). The effect of the approval of the settlement, the General Counsel, acting through his agent the Regional Director, exercised his final authority to decline to prosecute the complaint further. The appeal filed with the General Counsel to overrule the action of his Regional Director by Texaco contained exaggerated and unprovable allegations of violent threats and actions and previous violations inferentially attributed to respondent Plasterers, no evidence of which was ever

demonstrated. One basis of its objection to the informal settlement without trial was this very damage suit already filed by Texaco seeking $134,000.00 in actual damages for such unlawful action. While the private charging party has a right to be consulted and an opportunity to object to a proposed settlement (Leeds & Northrup Co. vs NLRB, 357 F.2d 527 (CA 3, 1966)), this same Fifth Circuit has ruled that it must present material issues of fact in its objection in order to obtain an evidentiary hearing; Concrete Materials of Georgia vs NLRB, 440 F.2d 61 (CA 5, 1971). The mere desire for an evidentiary hearing to support its private damage suit under Sec. 303 of the Act in order to take advantage of the principle of res adjudicata enunciated in the Painters District Council vs. Edgewood Contracting Co., supra, is not sufficient, 440 F.2d at p. 63.

The issue of Texaco's undisclosed appeal and the General Counsel's reversal of his Regional Director's approval and refusal to issue complaint was timely raised by respondent Plasterers by a special motion to approve the settlement agreement filed at the opening of the hearing with the Trial Examiner in September, 1968 (Appendix E). After referral to the Board by the Trial Examiner on October 16, 1968, after the close of the hearing, it was denied by telegram on November 8, 1968 (Appendix E). It was again renewed in exceptions to the Trial Examiner's decision and order and overruled by the Board in its decision on June 24, 1969, 176 NLRB 979 (Appendix E). The 5th Circuit in the proceeding on the petition to enforce discussed the setting aside of the settlement agreement and quoted the applicable rule (445 F.2d at p. 499, fn 4). The court failed to note, however, that under the rule Texaco was not required

and did not serve a copy of the appeal to the General Counsel on respondent Plasterers and respondent Plasterers was given no opportunity to reply to the exaggerated, false and unsubstantiated allegations of the appeal. The rule requires no service on respondent or other party, only on the Regional Director. 29 CAF 102.19.

On the petition to enforce the Circuit approached the appeal and the lack of notice to respondent from the viewpoint of the Board as a public agency enforcing a public right. It did not discuss the substantial prejudice to the respondent's private rights as the defendant in subsequent damage litigation to have a good faith officially approved settlement set aside without an opportunity to reply, and the prejudiced defendant suffered after it had complied, by being dragged through an expensive trial, winning before the Trial Examiner only to see the victory slip away on inferences and, we suggest, unfounded conclusions of two members of the Board. Nor did the Circuit discuss its earlier decision in Concrete Materials of Georgia, Inc., supra, or analyze the appeal, to question whether it raised any material facts, or the effect of this decision on the question of defendant's "private rights" in the 303 damage suit litigation. It rested its decision solely on the General Counsel's discretion as a public agency. In its later decision of January 15, 1973, it did not discuss the matter but apparently blindly assumed that a rule of "Fair and Full" hearing as it applies to a public agency, applies as well to the later private litigation.

V.

**THE TWO RELATED DOCTRINES ENCOURAGE LITIGATION AND ARE CONTRARY TO PUBLIC POLICY FAVORING SETTLEMENT OF LABOR DISPUTES.**

By its own definition requiring final action by the Board the Courts' application of the doctrines are uneven and inequitable. If respondent succeeds in obtaining administrative dismissal for lack of merit of the charges or concurrent dismissal after trial, it nevertheless is subject to a civil damage suit with the danger of being cast in judgment by the Jury or jury. United Brick & Clay Workers vs. Deena Artware, supra. If it settles, as here, and stops all activity after the filing of the Section 10(1) (29 USC 160 (1)) injunction proceeding and then settles the NLRB charges, it is still exposed, but receives full trial. Only if it tries the NLRB case first and fully and is successful do the doctrines apply to protect it from civil suit, International Wire vs. Local 38 IBEW, supra.

The doctrines ignore the public policy considerations of the statute and the public declared policy of the Board encouraged by the courts, 29 CAF 102.51. These doctrines encourage additional and continued litigation before and commands it after trial by the Labor Board rather than discouraging it. If action is delayed on the damage suit while the NLRB litigates, interest accumulates.

Once the recommended decision of the Administrative Judge (formerly Trial Examiner) has issued, compliance or settlement by the respondents is inadvisable since by complying or settling it waives its right to file exceptions to the recommended decision and the

decision becomes final. They are then exposed to these doctrines.[9] Paramount Transport Systems vs. Chauffeurs, Teamsters & Helpers, supra. After the Board decision, compliance or settlement again exposes respondent to the doctrines in the civil action. Painters District Council vs. Edgewood, supra. Respondent is thus given the unenviable choice, usually in a long dead labor dispute, of giving up its rights to full protection of the 7th Amendment and the rules of Civil procedure or continuing the expensive NLRB litigation. The public policy of encouraging compliance and settlements at later stages in the Labor Board proceeding is thus frustrated.[10] Alternatively it must demand a jury trial in every case.

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[9] The rule has a substantial peripheral effect before the NLRB. A lawyer must advise his client who is charged with a secondary boycott that it may be "safer" to settle, even when the violation is extremely doubtful and give up his right to a defense, rather than proceed to a hearing on the merits when an unfavorable ruling will mean res judicata in a 303 action.

[10] This case is an archtypical example of a long dead public interest and a long terminated dispute, if one existed. As early as Nov. 1967 the two respondents refrained from any further activity and complied with the stipulation prepared by the Regional Director and ordered by the Court. Thereafter when the Labor Board hearing was set Respondents entered into the settlements with the Labor Board, posted the required notices and lived up to them. Both respondents had fully complied with all of the subsequent requirements of the recommended order of the Trial Examiner and the

(continued on next page)

Section 303 contains no statute of limitations. Since the charging party is neither a true party at interest (see Sec. III A, supra) nor the only party who may be injured, anyone may file contemporaneously under Sec. 303 (a)(b), or after completion of the Labor Board proceedings. The union is then faced with the application of res adjudicata or collateral estoppel, as to party to the NLRB case, and a retrial of the same issue against a new party or non-participant under the doctrines. The rights of the

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10/ Continued

Board when they issued. However, because of the setting aside of the settlement and existence of the vigorously prosecuted concurrent civil suit it was necessary to carry the NLRB matter through the trial, the Board and Court of Appeal, at great expense in time and money to defendants and the Government. Respondents declined to enter into a "formal" settlement which provides for the issuance of a Board order and Court decree because of legal uncertainty of its legal effect on the pending Sec. 303 damage suit, even with a non-admission clause in the settlement stipulation. This question has not yet been decided by the courts. The doctrines now force respondents to continue litigation after the initial hearing. Alternatively respondent is forced to settle early before trial with NLRB, despite meritorious defenses for fear of the application of the doctrines, and thus is deprived of a "fair" procedure.

defendant become dependent upon the whim and timing of injured parties plaintiff. Once the Section 8(b)(4) proceeding reaches Complaint, a settlement or compliance at any step from then on, becomes foolhardy. Defendant generally is fully exposed to either doctrine since the Board cannot give a release for "whoever is injured" of civil liability whether a participating party or not, and favors or requires a "confession type" settlement of Board and Court Order, 29 CAF 101.9. The only protection defendant has is the full evidentiary rules and proceedings applicable to a suit at law.

Any other doctrine frustrates the public policy of encouraging settlements except at the expense of respondent's rights.

## CONCLUSION

For the reasons above stated, this petition for a writ of certiorari should be granted and the case set down for argument.

Respectfully submitted,

C. PAUL BARKER

JERRY L. GARDNER, JR.

711 Carondelet Building
New Orleans, Louisiana 70130

DODD, HIRSCH, BARKER, MEUNIER,
BOUDREAUX & LAMY

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon opposing counsel by mail on this 12th day of November, 1973.

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# APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

OCT 15 1973

C. Paul Barker, Esq.
Dodd, Hirsch, Barker & Meunier
Boudreaux & Lamy
711 Carondelet Bldg.
New Orleans, La. 70130

RE: OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL-CIO, v. TEXACO, INC., No. 72-6580.

Dear Sir:

The Court today entered the following order in the above-entitled case:

The motion of the petitioner for leave to proceed in forma pauperis is denied without prejudice to file printed petition in conformity with Rule 39 of the Rules of this Court and to pay the Clerk's costs on or before November 14, 1973.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

Oliver J. Butler, Jr., Esq.
Texaco, Inc.
1111 Rusk St.
P. O. Box 52332
Houston, Texas 77052

# APPENDIX B

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No 72-2890
Summary Calendar

D. C. Docket No. CA 13,323

TEXACO, INC.,

Plaintiff-Appellee,

versus

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION, LOCAL UNION NO. 685, AFL-CIO,

Defendant-Appellant,

*Appeal from the United States District Court for the* Western District of Louisiana

Before BROWN, Chief Judge, COLEMAN and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 15, 1973

Issued as Mandate: FEB 6 1973

**APPENDIX C**

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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**No. 72-2890**
**Summary Calendar***

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**TEXACO, INC.,**
**Plaintiff-Appellee,**

**versus**

**OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION, LOCAL UNION NO. 685, AFL-CIO,**
**Defendant-Appellant.**

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*Appeal from the United States District Court for the Western District of Louisiana*

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(January 15, 1973)

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Before BROWN, Chief Judge, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: This case raises again before this circuit the question of whether the determination by

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

the National Labor Relations Board that a union had committed an unfair labor practice in violation of the National Labor Relations Act is *res judicata* in a subsequent suit for damages under Section 303 of the Labor-Management Relations Act. In this case the NLRB held that the appellant union violated Section 8(b)(4)(ii)(B) by engaging in certain unprotected secondary activity affecting appellee Texaco. The District Court for the Western District of Louisiana held this NLRB decision *res judicata* on the issue of liability and conducted a trial only on the question of damages. Texaco was awarded damages in excess of $24,000.00, and the union now appeals. We affirm.

We note that the NLRB finding of illegal secondary activity in this case was challenged by the union in an enforcement proceeding before this court and that we granted enforcement of the order. *National Labor Relations Board* v. *Lafayette Building & Construction Trades Council*, 5 cir. 1971, 445 F.2d 495.

While the result of applying *res judicata* in this case may seem harsh, especially since there are some definite differences between Board and court proceedings, we feel that affirmance is compelled by the existing case law in this circuit. *Painters* v. *Edgewood Construction Co.*, 5 Cir. 1969, 416 F.2d 1081; *H. L. Robertson & Associates, Inc.*, v. *Plumbers Local 519*, 5 Cir. 1970, 429 F.2d 520. We feel that these two cases are in point on the issue raised in this case and therefore the opinion of the district court is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

# APPENDIX D

**TEXACO, INC.**

**v.**

**OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION, LOCAL UNION NO. 625, AFL-CIO.**

**Civ. A. No. 12232.**

**United States District Court, W. D. Louisiana, Lafayette Division.**

**May 26, 1972.**

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**Oliver J. Butler, Jr., Houston, Tex., for plaintiff.**

**Dodd, Hirsch, Barker, Meunier, Boudreaux & Lamy, C. Paul Barker, New Orleans, La., for defendant.**

EDWIN F. HUNTER, Jr., District Judge:

This is a suit for damages pursuant to Sections 301 and 303 of the National Labor Relations Act, as amended (hereinafter referred to as the "Act"). Plaintiff alleges that it incurred actual monetary damages as a result of certain unlawful secondary boycott activity and conduct by defendant in violation of Section 8(b) (4) (ii) (B) of the Act, and that defendant is liable to plaintiff for such damages.

The same activity and conduct of defendant which is alleged by plaintiff to have constituted an unlawful secondary boycott was the subject of unfair labor practice charges filed with the National Labor Relations Board (hereinafter referred to as the "Board") by plaintiff herein against defendant herein. And, in a decision issued on June 24, 1969, the Board held that such activity and conduct of defendant did constitute an unlawful secondary boycott in violation of Section 8(b) (4) (ii) (B) of the Act [Lafayette Building and Construction Trades Council, AFL-CIO, et al., 176 NLRB No. 137, 71 LRRM 1591]. Subsequently, in a decision issued on July 1, 1971, the United States Court of Appeals for the Fifth Circuit affirmed and enforced the decision by the Board [NLRB v. Lafayette Building and Construction Trades Council, AFL-CIO, et al., 445 F.2d 495].

The prior adjudication by the Board and the Court of Appeals with respect to defendant's unlawful secondary boycott activity and conduct being considered by this court to be res judicata as to the issue of defendant's liability in the instant cause [Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (CA-5, 1969); H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519, 429 F.2d 520 (CA-5, 1970)], Judge Putnam issued an order in the instant cause on September 3, 1971, granting summary judgment to plaintiff against defendant on the issue of defendant's liability.

Thereafter, trial was had on the issue of damages on March 21, 1972.

## FINDINGS OF FACT

1. Plaintiff is a corporation doing business in Louisiana, and is now and was at all times pertinent a "person" engaged in "commerce" as defined in Sections 2(1) and 2(6) of the National Labor Relations Act, as amended. At all times pertinent plaintiff has maintained and operated a facility located near Erath, Louisiana, known as Texaco's Henry Gas Processing Plant, which plant is engaged in the processing of natural gas.

2. Defendant is a labor organization domiciled in Lafayette, Louisiana, and is now and was at all times pertinent a "labor organization" as defined in Section 2(5) of the National Labor Relations Act, as amended. Harry E. Delahoussaye and Leonard Brailey have been duly authorized officers, agents, representatives, and members of defendant.

3. During the period from on or about May 29, 1967 to on or about June 27, 1969, additional facilities were under construction at plaintiff's Henry Gas Processing Plant (hereinafter referred to as the "Henry Plant"). The general contractor for such construction was Dresser Engineering Company (hereinafter referred to as "Dresser"), whose principal office and place of business is located in Tulsa, Oklahoma. During the period of construction, Dresser main-

tained offices at the construction situs at the Henry Plant. Dresser was a "person" engaged in "commerce" or in an industry "affecting commerce" as defined in Sections 2(1), 2(6), and 2(7) of the National Labor Relations Act, as amended.

4. The contract between plaintiff and Dresser was a "cost plus fixed fee" agreement, under the terms of which plaintiff was obligated *inter alia* to reimburse Dresser for all costs incurred by Dresser for concrete purchased by Dresser for use in connection with the construction at the Henry Plant. And, pursuant to the terms of such contract, plaintiff did reimburse Dresser for all costs incurred by Dresser for concrete purchased by Dresser for use in connection with such construction—including, specifically, all costs referred to hereinafter.

In June 1967, Dresser solicited bids from concrete suppliers to furnish all concrete to be required for the construction at the Henry Plant, advising such suppliers that the construction work was expected to last for approximately one year and that it was expected that approximately 10,000 cubic yards of concrete would be required. The low bidder was DuBois Concrete Works, Inc., of Abbeville, Louisiana (hereinafter referred to as "DuBois Concrete"), which offered to supply all concrete to be required for such construction, delivered to the job site in DuBois Concrete's trucks, at the following prices per cubic yard (plus 3% Louisiana sales tax):

| | | |
|---|---|---|
| 4 | Bag Mix | $15.00 |
| 4½ | Bag Mix | 15.60 |
| 5 | Bag Mix | 16.20 |
| 5½ | Bag Mix | 16.80 |
| 6 | Bag Mix | 17.40 |

Accordingly, a verbal agreement was entered into between Dresser and DuBois Concrete for the purchase by Dresser from DuBois Concrete of all concrete required for such construction at the quoted prices.

5. At all times pertinent, DuBois Concrete was a "person" engaged in "commerce" or in an industry "effecting commerce" as defined in Sections 2(1), 2(6), and 2(7) of the National Labor Relations Act, as amended.

Pursuant to the terms of its agreement with Dresser, DuBois Concrete commenced supplying concrete to Dresser on June 23, 1967, such concrete being delivered to the Henry Plant job site by DuBois Concrete. DuBois Concrete continued to supply concrete to Dresser on such basis through August 9, 1967.

Because it did not wish to cross a picket line placed at the Henry Plant job site by a labor union not involved in this cause, DuBois Concrete refused to deliver concrete to the job site after August 9, 1967. However, DuBois Concrete did agree to continue supplying concrete to Dresser by loading Dresser trucks at DuBois Concrete's plant in Abbeville if Dresser would obtain concrete trucks for its own use.

As a result, Dresser leased concrete trucks. And, on August 21, 1967, DuBois Concrete commenced supplying concrete to Dresser by loading Dresser trucks at DuBois Concrete's plant—a procedure referred to as "batching out." Upon commencement of this new supply procedure, new prices were verbally agreed upon by Dresser and DuBois Concrete to reflect the fact that the concrete was not being delivered to the job site by DuBois Concrete. Such new prices were as follows, per cubic yard (plus 3% Louisiana sales tax):

| | | |
|---|---|---|
| 4 | Bag Mix | $14.00 |
| 5 | Bag Mix | 15.13 |
| 6 | Bag Mix | 16.26 |

6. The National Labor Relations Board found that: after DuBois had commenced supplying concrete to Dresser by "batching out" at DuBois Concrete's plant, defendant's agent, Harry E. Delahoussaye, came to DuBois Concrete's plant and talked with Lifey DuBois, President of DuBois Concrete. Such visit and conversation occurred sometime on or after August 29, 1967, and prior to September 7, 1967. Delahoussaye inquired whether DuBois was "batching out" concrete to Dresser, and

if so, whether DuBois intended to continue doing so. DuBois replied that he was "batching out" concrete to Dresser and intended to continue doing so. Delahoussaye thereupon advised DuBois that he would be sorry if he continued to do so. Delahoussaye further informed DuBois that the cement finishers might refuse to work on jobs using concrete furnished by DuBois, and stated that other firms which had supplied concrete in opposition to the Union's desires had been forced to go out of business.

Thereafter, on September 7, 1967, defendant's agent, Leonard Brailey, was contacted by George Trahan, Manager of Southside Lumber and Supply Company, of Abbeville (hereinafter referred to as "Southside"), and was requested to furnish cement finishers for a construction job being conducted by Southside. The concrete for such job was to be supplied by DuBois Concrete. When contacted, Brailey agreed to furnish the requested cement finishers. However, a few minutes later, Brailey telephoned Trahan and advised that Trahan's request for cement finishers could not be honored because DuBois Concrete was "batching out" concrete to Dresser. Trahan immediately advised DuBois Concrete of Brailey's comments and stated that as a result Southside would have to cancel its order for concrete from DuBois Concrete.

After being advised by Trahan of Brailey's comments, DuBois Concrete decided to cease supplying concrete to Dresser. Such decision by DuBois Concrete was based on a determination that DuBois Concrete could not operate its business if the cement finishers would not work on concrete supplied by it.

Both Trahan and Brailey were advised by Lifey DuBois of DuBois Concrete's decision to cease supplying concrete to Dresser. And, upon being so advised, Brailey thereupon agreed to furnish cement finishers for the concrete to be supplied by DuBois Concrete for the Southside job. Delahoussaye was also advised by Lifey DuBois of DuBois Concrete's decision to cease supplying concrete to Dresser. And, upon being so advised, Delahoussaye assured DuBois that cement finishers would be furnished for the Southside job. Thereafter, work on the Southside job proceeded without difficulty.

7. Later in the day, on September 7, 1967, Dresser was informed of DuBois Concrete's decision to cease supplying concrete to Dresser. And, no concrete was supplied to Dresser by DuBois Concrete on or after September 7, 1967.

As a result of DuBois Concrete's action in refusing to continue supplying concrete, Dresser contacted other concrete suppliers within the South Louisiana area in an attempt to secure concrete. However, all of the suppliers contacted refused to furnish concrete to Dresser for the job.

After such unsuccessful contacts with the concrete suppliers in the area, Dresser received a proposal from Roy Young, Inc., of Abbeville (hereinafter referred to as "Young"), to supply concrete for the job. Young proposed to rent and operate a concrete plant, solely to supply Dresser, on a cost-plus-10% basis. And, as a condition of such proposal, Young insisted upon assurance that such arrangement endure for at least 12 months—taking the position that it would not be sufficiently profitable to Young to undertake such arrangement for a shorter period of time.

8. Dresser recognized that its costs for concrete would be substantially increased if it agreed to Young's proposal. However, being of the opinion that concrete was not available to it from any other source, Dresser determined that the arrangement proposed was reasonable under the circumstances.

Dresser and Young entered into a verbal agreement whereby Young would rent, install and operate a concrete plant for the sole purpose of supplying concrete to Dresser with all costs incurred by Young in connection therewith being reimbursed by Dresser, plus a 10% fee

to Young, with the land upon which such concrete plant was to be installed to be rented from Young at an agreed upon cost, and with certain equipment to be used in connection with such operation to be rented from Young at an agreed upon cost. Under the terms of such agreement, the concrete would be "batched out" to Dresser's trucks at the plant operated by Young, rather than be delivered by Young to the job site. And, as insisted upon by Young, it was agreed that such arrangement would extend for a minimum period of 12 months.

Pursuant to such agreement between Dresser and Young, Young proceeded to rent and install a concrete plant. And, Young commenced supplying concrete to Dresser on October 2, 1967.

In the meantime, during the period between September 7 and October 2, 1967, Dresser had rented a small concrete mixer and "field mixed" 338.25 cubic yards of 5½ Bag Mix concrete on the job site. The costs to Dresser for such concrete amounted to $6,532.19. Had such concrete been obtained from DuBois Concrete at the agreed upon prices in effect when DuBois Concrete ceased supplying on September 7, 1967, the costs to Dresser for such concrete would have been $5,846.90. Thus, the additional costs incurred by Dresser in obtaining such concrete amounted to $685.29.

Young supplied concrete to Dresser pursuant to the terms of the aforementioned agreement from October 2, 1967 until August 27, 1968. During such period, Young supplied 24 cubic yards of 5½ Bag Mix concrete, 1,387.5 cubic yards of 6 Bag Mix concrete, 5,653 cubic yards of 6½ Bag Mix concrete, and 3,381.5 cubic yards of 6¾ Bag Mix concrete. The costs incurred by Dresser for such concrete amounted to $239,855.37. Had such concrete been obtained from DuBois Concrete at the agreed upon prices in effect when DuBois Concrete ceased supplying on September 7, 1967, the costs to Dresser for such concrete would have been $181,176.11. Thus, the additional costs incurred by Dresser in obtaining such concrete amounted to $58,680.26.

At the behest of Dresser, the aforementioned agreement between Dresser and Young was terminated on August 27, 1968. And, effective August 28, 1968, Young agreed to supply concrete to Dresser at an agreed upon price per cubic yard, with such concrete still to be "batched out" to Dresser's trucks at Young's plant, and with it being agreed that Young would still furnish concrete solely for Dresser. The agreed upon price per cubic yard was as follows (plus 3% Louisiana sales tax):

| | | |
|---|---|---|
| 4 | Bag Mix | $21.92 |
| 4½ | Bag Mix | 22.28 |
| 5 | Bag Mix | 22.46 |
| 5½ | Bag Mix | 22.83 |
| 6 | Bag Mix | 22.97 |
| 6½ | Bag Mix | 23.34 |
| 6¾ | Bag Mix | 23.54 |

Young supplied concrete to Dresser at the prices noted above from August 28, 1968 until April 24, 1969. During such period, Young supplied 83 cubic yards of 5½ Bag Mix concrete and 991 cubic yards of 6¾ Bag Mix concrete. The costs incurred by Dresser for such concrete amounted to $25,979.70. Had such concrete been obtained from DuBois Concrete at the agreed upon prices in effect when DuBois Concrete ceased supplying on September 7, 1967, the costs to Dresser for such concrete would have been $18,803.90. Thus, the additional costs incurred by Dresser in obtaining such concrete amounted to $7,075.80.

Effective April 25, 1969, Young entered into the business of supplying concrete to the general public. And, on such date, Young commenced supplying concrete to Dresser by delivery to Dresser's job site in Young's trucks, rather than by "batching out" to Dresser's trucks. A new price per cubic yard was agreed upon, based on delivery by

Young, as follows (plus 3% Louisiana sales tax):

| | | |
|---|---|---|
| 4 | Bag Mix | $24.00 |
| 4½ | Bag Mix | 24.75 |
| 5 | Bag Mix | 25.50 |
| 5½ | Bag Mix | 26.25 |
| 6 | Bag Mix | 27.00 |
| 6½ | Bag Mix | 27.75 |
| 6¾ | Bag Mix | 28.13 |

The charts show that Young supplied concrete to Dresser by delivery to the job site at the prices noted above from April 25, 1969 until June 27, 1969. During such period, Young supplied 12 cubic yards of 4 Bag Mix concrete, 15 cubic yards of 4½ Bag Mix concrete, 334 cubic yards of 5½ Bag Mix concrete, 23.5 cubic yards of 6 Bag Mix concrete, 11 cubic yards of 6½ Bag Mix concrete, and 96 cubic yards of 6¾ Bag Mix concrete. The costs incurred by Dresser for such concrete amounted to $13,459.08. Had such concrete been obtained from DuBois Concrete at the agreed upon prices in effect when DuBois was delivering concrete to the job site prior to August 9, 1967, the costs to Dresser for such concrete would have been $8,640.57. Thus, the additional costs incurred by Dresser in obtaining such concrete amounted to $4,818.51.

From the foregoing, it is apparent that the total costs incurred by Dresser for concrete during the period from September 7, 1967 to June 27, 1969 amounted to $285,826.34. Had such concrete been obtained from DuBois Concrete at the agreed upon prices in effect prior to September 7, 1967, the total costs to Dresser would have been $214,466.48. Thus, the total additional costs incurred by Dresser in obtaining concrete after September 7, 1967 amounted to $71,359.86.

9. The contract between Dresser and Young was renegotiated twice in 1969, each time upwards. There was no explanation for the constantly increasing cost apparently beyond the competitive market of the exclusive supplier, Roy Young. Dresser made no apparent effort to minimize the cost of the supply of concrete. After the charges before the NLRB were filed and defendant had entered into a settlement publicly advising the government and all other parties that it would cease and desist from any conduct deemed unlawful, no effort was made to rearrange or to obtain concrete from different suppliers at a lower cost.

Dresser "field mixed" the concrete between September 7, 1967, and October 2, 1967, at prices 11.72% above the contract price with DuBois Concrete. Given the above factors, we feel that this increase reflects most equitably the overall increase to Dresser. In addition, we conclude that the upward revision of the contract with Young, effective April 25, 1969, severed all damages for which the defendants could be held responsible. We are persuaded that an equitable award in this case would be 11.72% of $205,825.91, or $24,122.80.

## CONCLUSIONS OF LAW

[1] 1. This Court considers the adjudications previously made by the Board and the United States Court of Appeals for the Fifth Circuit that such actions and conduct constituted an unlawful secondary boycott in violation of Section 8(b) (4) (ii) (B) of the Act to be res judicata.[1]

2. Defendant contends that even though the prior adjudications be considered res judicata as to its actions and conduct constituting an unlawful secondary boycott, such prior adjudications are not res judicata as to its liability for any damages incurred by plaintiff since neither the Board nor the Court of Appeals found that DuBois Concrete ceased supplying concrete to Dresser *because* of defendant's unlawful actions. Defendant further contends that there is no

1. This Court, or a jury unhampered, might not have found as the Board did that Delahoussaye threatened DuBois with an object of forcing or requiring DuBois to cease doing business with Dresser and that by such conduct respondent Plasterers violated Section 8(b) (4) (ii) (B) of the Act.

evidence of record to support a finding that DuBois Concrete ceased supplying concrete to Dresser *because* of defendant's unlawful actions, and that absent such evidence it cannot be found to have any liability for any damages incurred by plaintiff.

This Court finds no merit in such contentions of defendant. First of all, in the opinion of this Court, the Board did, in fact, find that DuBois Concrete ceased supplying Dresser *because* of defendant's unlawful actions. And, this Court therefore considers the Board's decision to be res judicata as to defendant's liability for resultant damages. The following excerpts from the Board's decision seem to this Court to be dispositive on such point:

"* * * On September 7, 1967, and just shortly after Delahoussaye's visit to DuBois, the Southside Lumber and Supply, Inc., a customer of DuBois, placed an order for cement with DuBois and called respondent Plasterers' agent, Brailey, to secure certain cement finishers. Southside's general manager, Trahan, testified that Brailey agreed to honor the request for cement finishers when first contacted. He further testified, however, that a few minutes later Brailey advised Trahan that his earlier request could not be honored because DuBois was batching out concrete to Dresser. Trahan then contacted DuBois and advised him that he was obliged to cancel the order and he informed DuBois of the reason for Brailey's refusal to furnish the cement finishers. DuBois immediately advised Trahan that he would cease batching out to Dresser which, in fact, he did that very day * * *."

"* * * [*W*]*hen a union causes a secondary employer to cease doing business with a primary employer, as in the present case,* that conduct constitutes a secondary boycott of the type which Section 8(b) (4) (B) was intended to proscribe * * *."

(Emphasis added)

[2] 3. The plaintiff urges on us the proposition that the plaintiff should not be required to minimize its damage since this was a willful tort. Economic action in any labor dispute is intentional and willful. It becomes illegal only when so defined by law or when carried out in an unlawful manner or for unlawful purposes. This action of defendant for the purposes as found by the Labor Board whether willful or not, was unlawful only because of the statute. Plaintiff clearly has the duty to minimize damages if it is reasonably possible to do so. Vulcan Materials Co. v. United Steelworkers of America (5th Cir., 1970), 430 F.2d 446.

[3] Where the activity of the defendant union has ceased, the defendant cannot be held responsible for continued loss not occasioned by its actions. Thus in Ritchie v. United Mine Workers of America, supra, the Sixth Circuit said at 410 F.2d 836:

"In the event of a new trial under § 303 of the LMRA we hold that proof of damages should be limited to those which are the direct and proximate result of the secondary boycott. Gilchrist v. UMW, supra. The secondary boycott took place during the time of picketing. All picketing had ceased April 30, 1959, long prior to the burning of the tipple. Thus under the facts of this case, the loss of the tipple and the resulting loss of profits are not a part of the measure of damages against the UMW resulting from the secondary boycott."

4. Plaintiff is awarded judgment against defendant in the sum of $24,122.80, together with costs and legal interest from date of judicial demand.

# APPENDIX E

**Lafayette Building and Construction Trades Council, AFL-CIO *and* Plasterers and Cement Masons Local Union No. 685, AFL-CIO *and* Texaco Inc.**
Cases 15-CC-325-1 and 15-CC-325-2

June 24, 1969

## DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On January 15, 1969, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that Respondent LaFayette Building and Construction Trades Council, AFL-CIO, had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision. The Trial Examiner also found that Respondent Plasterers and Cement Masons Local Union No. 685, AFL-CIO, had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed with respect to those allegations. The Respondents, the Charging Party, and the General Counsel each filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel also filed a brief in support of the Trial Examiner's Decision.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions and modifications set forth below.

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[1] In its exceptions, Respondent Lafayette Building and Construction Trades Council, AFL-CIO, renews its motion to approve settlement agreement and objects to the issuance of a formal Board order in this case. The record reveals that after the Regional Director had issued a complaint, he entered into an informal settlement agreement with Respondent providing for withdrawal of the complaint and the posting of notice by Respondent. The settlement agreement was expressly conditioned upon the approval of the General Counsel. The Charging Party refused to sign the agreement and appealed to the General Counsel, who sustained the appeal and directed the Regional Director to set aside the agreement and reissue the complaint. When the motion to approve the settlement agreement was made to the Trial Examiner, he referred it to the Board. The Board denied the motion. It is apparent from the foregoing that the parties have not entered into a binding settlement of the issues involved in this case.

Moreover, the notice provisions of the tentative settlement agreement which Respondent assertedly posted were drawn more narrowly than are the terms of notices normally required in cases involving the type of unlawful picketing engaged in by Respondent. Accordingly, to insure the final settlement of this dispute in accordance with our normal practices and procedures, we shall issue an appropriate order.

We agree with the Trial Examiner's finding that Respondent Council violated Section 8(b)(4)(i) and (ii)(B) of the Act by placing its picket sign at a point passed by employees of employers other than the primary employer, Dresser. However, we cannot agree with his dismissal of the violations alleged against Respondent Plasterers.

The complaint alleged that Respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act by threatening, coercing, and restraining DuBois from doing business with Dresser with whom the Plasterers had a labor dispute. The Trial Examiner dismissed this allegation of the complaint on the ground that it relied almost exclusively on the testimony of DuBois whose accent and assertions the Trial Examiner found to be unclear and on the further ground that the intrinsic logic of the situation favored the dismissal in that the Plasterers, in the Trial Examiner's view, did not appear to have any direct quarrel with Dresser which would sufficiently motivate it to engage in the proscribed conduct. We cannot agree with these conclusions.

We do not find the testimony of DuBois to be as unclear as did the Trial Examiner, nor do we believe that the violation alleged rests almost exclusively upon that testimony. We also note initially that although the Trial Examiner encountered difficulty with DuBois' testimony, he actually made no credibility resolutions between the conflicting testimony of DuBois and the union agent, Delahoussaye, except in one instance, hereinafter discussed, which we do not find controlling as to the existence or nonexistence of the violation alleged.[3] In other words, rather than resolving the conflicts between the contradictory testimony of these two witness, the Trial Examiner declined to find a violation of the Act on evidence he had difficulty in understanding. Inasmuch, therefore, as we do not have the difficulty with DuBois' testimony as did the Trial Examiner, we are obliged to examine that testimony anew as well as the relationship which exists between that testimony and other evidence, some of which the Trial Examiner had not discussed.

Harrell, office manager of Dresser, testified that that Company had engaged DuBois to deliver ready-mix cement at the Texaco construction site. The first delivery commenced on June 23, 1967, and DuBois continued to deliver cement until August 9, 1967, when Local 106, Plumbers and Pipefitters,

[3] The Trail Examiner credited Delahoussaye over DuBois when the former testified that DuBois asked him what the Union would do if he continued "batching out" to Dresser (i.e., furnishing cement to the primary employer) and then testifying that DuBois answered his own question by stating that the cement finishers would refuse to refinish DuBois concrete. DuBois, of course, had testified that it was Delahoussaye who had stated that the cement finishers would refuse, under these circumstances, to refinish concrete supplied by DuBois. It is difficult to understand the Trial Examiner's credibility resolution in this regard, because Delahoussaye later twice contradicted this assertion that the threat to remove the cement finishers came from the statement made by DuBois himself. In any event, the issue we must determine is not dependent upon this one credibility resolution made by the Trial Examiner.

AFL-CIO, established a picket line at a gate reserved for Dresser's employees and suppliers. Thereafter, DuBois refused to deliver cement to Dresser, but later did agree to "batch out"; i.e., permit Dresser to pick up cement at the DuBois plant with its own or leased trucks. This agreement continued until September 7, 1967.

DuBois testified that sometime in the beginning of September 1967 he was visited at his plant by Respondent's agent, Delahoussaye, who inquired if he, DuBois, were batching out to Dresser and if he intended to continue doing so. Delahoussaye concededly told DuBois that the men were disturbed by such arrangement and had complained to him about it. DuBois testified that he informed Delahoussaye that he would continue to do so and was told in return that he would be sorry if he did.[3] There is contradictory testimony as to whether, at this point, DuBois himself then suggested that perhaps in retaliation the cement finishers might quit working on jobs using DuBois cement or whether this statement was made by Delahoussaye. Delahoussaye, in response to Mrs. DuBois' question as to whether that would be lawful, informed DuBois and his wife that if the members of his Union refused to handle DuBois cement on an individual basis, it would not be the fault of the Union. DuBois credibly testified that Delahoussaye further informed him that other employers who had batched out in opposition to the Union had eventually been obliged to go out of business. Thus, Delahoussaye, an agent of the Respondent, informed DuBois that his men were disturbed because of DuBois batching out to Dresser, that DuBois would be sorry if he continued to do so, and that other employers who had engaged in a similar course of dealing with a picketed employer had been forced to go out of business and clearly implied that the Respondent's members would not work DuBois' cement if he continued batching out to Dresser.[4]

Moreover, Delahoussye's remarks must be considered in the context of other events initiated by conduct of Respondent Plasterers' agent, Brailey. On September 7, 1967, and just shortly after Delahoussaye's visit to DuBois, the Southside Lumber and Supply, Inc., a customer of DuBois, placed an order for cement with DuBois and called Respondent Plasterers' agent, Brailey, to secure certain cement finishers. Southside's general manager, Trahan, testified that Brailey agreed to honor the request for cement finishers when first contacted. He further testified, however, that a few

[3] Delahoussaye did not deny telling DuBois he would be sorry for continuing to batch out, but rather he testified he could not remember making such a statement.

[4] In these circumstances, we believe it makes little difference whether DuBois answered his own question about what would happen if he continued to batch out to Dresser with the remark that the cement finishers would refuse to work the concrete, or if Delahoussaye supplied that answer. One thing is clear, Delahoussaye did not deny the likelihood of such response by stating that the men could lawfully do individually what the Union could not direct them to do.

minutes later Brailey advised Trahan that his earlier request could not be honored because DuBois was batching out concrete to Dresser. Trahan then contacted DuBois and advised him that he was obliged to cancel the order and he informed DuBois of the reason for Brailey's refusal to furnish the cement finishers. DuBois immediately advised Trahan that he would cease batching out to Dresser which, in fact, he did that very day. Still later on September 7, DuBois attempted to contact Delahoussaye to advise him of this decision but was unsuccessful at that time. Instead, DuBois contacted Brailey and advised him that he had quit batching out to Dresser. Brailey thereupon agreed to furnish the necessary cement finishers to finish the cement that DuBois intended to supply to Trahan. Trahan similarly advised Brailey of DuBois' cessation of business with Dresser, whereupon Brailey agreed to furnish the cement finishers for Trahan's job the next morning. On the evening of September 7 DuBois finally contacted Delahoussaye and advised him of his decision to cease doing business with Dresser. Delahoussaye assured DuBois that he would see to it that men were furnished to finish the Trahan job if Brailey was unable to do so. The work on Trahan's job thereafter proceeded without any difficulty. Considering all the foregoing, we find that Delahoussaye did threaten DuBois that Respondent's members would not work his cement unless he quit batching out to Dresser, with an object of forcing or requiring DuBois to cease doing business with Dresser, and that by such conduct Respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act.

Nor do we believe that the evidence supporting the finding of an 8(b)(4)(ii)(B) violation discussed above is in any way weakened by the Trial Examiner's suggestion that the intrinsic logic of the situation favors a dismissal of this violation on the ground that the Respondent Plasterers did not appear to have a quarrel or dispute with the primary employer, Dresser. In the first place, the establishment of an 8(b)(4)(ii)(B) violation for a union's having applied proscribed pressure against a secondary employer is not dependent upon the existence of an active labor dispute between that union and the primary employer. Indeed, when a union causes a secondary employer to cease doing business with a primary employer, as in the present case, that conduct constitutes a secondary boycott of the type which Section 8(b)(4)(B) was intended to proscribe irrespective of the existence of an *active* dispute between the nonunion employer and the union.[5] Secondly, the conduct of Respondent's agents, Delahoussaye and Brailey, the one making a threat to DuBois and the other implementing that threat, clearly suggests that there was in fact a

[5] *Sand Door and Plywood Co.*, 113 NLRB 1210, 1213, enfd. 241 F.2d 147 (C.A. 9), affd. 357 U.S. 93; *Washington-Oregon Shingle Weavers District Council*, 101 NLRB 1159, enfd. 211 F.2d 149 (C.A. 9).

dispute between Respondent Plasterers and Dresser, although perhaps not as direct or active a dispute as that existing between Dresser and Local 106, Plumbers, the latter being actively engaged in picketing the former. Clearly, every action taken by both Delahoussaye and Brailey speaks specifically to the existence of a dispute between Respondent Plasterers and this nonunion employer. Accordingly, under these circumstances, we find that Respondent Plasterers, in aid of Local 106's dispute with the primary employer, Dresser, through the action of its agents, Delahoussaye and Brailey, applied pressure upon the secondary employer, DuBois, and thereby threatened, coerced, and restrained DuBois with the object of forcing or requiring DuBois to cease doing business with Dresser in violation of Section 8(b)(4)(ii)(B) of the Act.

### THE REMEDY

Having found that both Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action.

### CONCLUSIONS OF LAW

1. By establishing a picket sign at Boston and Parish Roads, some distance from the access to the Henry Gas Plant, Respondent Council violated Section 8(b)(4)(i) and (ii)(B) of the Act.
2. By threatening, coercing, and restraining DuBois with the object of forcing or requiring DuBois to cease doing business with Dresser, Respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

A. Respondent Lafayette Building and Construction Trades Council, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in, or inducing any individual employed by DuBois Concrete Works, Inc., Texaco, Inc., or any other person engaged in commerce or in a business affecting commerce to engage in, a strike or a refusal in the course of his employement to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or threatening, coercing, or restraining DuBois Concrete Works, Inc., or Texaco Inc., or any other person engaged in commerce or in a business affecting commerce with the object of forcing DuBois Concrete Works, Inc., Texaco Inc., or any other person to cease doing business with Dresser Engineering, Inc.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix A."[1] Copies of the notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent Council's representative, shall be posted by Respondent Council immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Council to insure that the notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver to the Regional Director signed copies of the notice for posting by DuBois Concrete Works, Inc., Texaco, Inc., and Dresser (if willing) in a manner corresponding to the preceding paragraph.

B. Respondent Plasterers and Cement Masons Local Union No. 685, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, or restraining DuBois Concrete Works, Inc., and any other persons engaged in commerce or in an industry affecting commerce where an object thereof is forcing or requiring DuBois Concrete Works, Inc., or any other person to cease doing business with Dresser Engineering, Inc.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[1] Copies of the notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent Plasterers' representative, shall be posted by Respondent Plasterers immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Plasterers to insure that the notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver to the Regional Director signed copies of the notice for posting by DuBois Concrete Works, Inc., and Dresser Engineering Inc. (if willing), in a manner corresponding to the preceding paragraph.

(c) Notify the Regional Director, in writing, within 10 days from the date of receipt of this Order, what steps have been taken to comply herewith.

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[1] In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order.

"In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

MEMBER BROWN, dissenting:

The Respondent in this case has offered to comply in full with the Act and to take all steps which might be required under a Board Order. Unlike my colleagues, I would accept this offer in light of the minimal nature of the violations and the absence of any indication of a pattern of similar misconduct.[8] To do so would result in a considerable saving of both time and money which is otherwise required to dispose of the issues. Further, no special advantage is to be gained by the issuance of a Board Order or court decree. In the event of a recurrence of the misconduct, relief can be more speedily obtained by filing a new charge and petitioning for an injunction under Section 10(1).

[8] *Cf. Local 138, International Union of Operating Engineers, AFL-CIO (Nassau and Suffolk Contractors' Association, Inc.)* 174 NLRB No. 111, and *J. J. Hagerty, Inc.*, 174 NLRB No. 112.

## APPENDIX A

### NOTICE TO ALL MEMBERS OF LAFAYETTE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

Pursuant to the Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage individuals employed by Texaco, Inc., DuBois Concrete Works, Inc., or any employer other than Dresser Engineering, Inc., to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or interfere with, restrain, or coerce Texaco, Inc., DuBois Concrete Works, Inc., or any other person engaged in commerce or in a business affecting commerce with the object of forcing Texaco, Inc., or DuBois Concrete Works, Inc., or any other person to cease doing business with Dresser Engineering, Inc.,

LAFAYETTE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans, Louisiana 70113, Telephone 504-527-6361.

## APPENDIX B

**NOTICE TO ALL MEMBERS OF PLASTERS AND CEMENT MASONS LOCAL UNION NO. 685, AFL-CIO**

Pursuant to the Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT threaten, coerce, or restrain DuBois Concrete Works, Inc., or any other persons engaged in commerce or in an industry affecting commerce where an object thereof is forcing or requiring DuBois Concrete Works, Inc., or any other person to cease doing business with Dresser Engineering, Inc.

PLASTERS AND CEMENT MASONS LOCAL UNION No. 685, AFL-CIO (Labor Organization)

Dated By (Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans, Louisiana 70113, Telephone 504-527-6361.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

JOHN F. FUNKE, Trial Examiner: Upon charges filed October 19, 1967, by Texaco Inc., herein Texaco, against the Lafayette Building and Construction Trades Council, AFL-CIO, herein the Respondent Council, and against Plasterers and Cement Workers Local Union No. 685, AFL-CIO, herein the Respondent Plasterers, the General Counsel issued a consolidated complaint dated July 23, 1968, alleging Respondent Council violated Section 8(b)(4)(i) and (ii)(B) of the Act and Respondent Plasterers violated Section 8(b)(4)(i)(B) of the Act.

The answer of the Respondents denied the commission of any unfair labor practices.[1]

This proceeding, with all parties represented, was heard by me at Lafayette, Louisiana, on September 26, 1968, and at the conclusion of the hearing the parties were granted leave to file briefs. Briefs were received from the General Counsel and Respondents on November 12.

Upon the entire record in this case[2] and from my observation of the witnesses while testifying, I make the following:

### FINDINGS AND CONCLUSIONS

#### I. MOTION TO APPROVE SETTLEMENT AGREEMENT

[1] The name of the Charging Party has been corrected in accordance with the Charging Party's motion to correct the record.

[2] On October 28, Texaco moved to correct the record herein as set forth in said motion. No opposition having been received, the record is so amended.

On November 20, 1967, the Regional Director for Region 15, issued in the name of the General Counsel, a consolidated complaint alleging Respondents Council and Plasterers violated Section 8(b)(4)(ii)(B) of the Act. (As to Respondent Council, the complaint further alleged violation of Section 8(b)(4)(i)(B).)[1]

On March 13, 1968, the Respondents entered into settlement agreements with the Regional Office by which it agreed to cease and desist from the conduct alleged as unlawful in the complaint of November 20 and agreed to post the usual notices.[2] As far as this record reveals the Respondents fully complied with the terms of the settlement agreements. Texaco, the Charging Party, was not a party to the settlement agreements.

On March 14, the Acting Regional Director advised all parties that, based upon the settlement agreements, further proceedings would not effectuate the policies of the Act.[3] The parties were also advised of their right to appeal the decision to the General Counsel.

On March 24, Texaco appealed from the decision of the Acting Regional Director.[4]

On July 16, 1968, the Office of Appeals of the General Counsel sustained the appeal and remanded the cases to the Region for reissuance of complaint. This document, not a part of the record herein,[5] reads:

Mr. Oliver J. Butler, Jr.

Attorney at Law

Texaco, Inc.

P.O. Box 52332

Houston, Texas 77052

Dear Mr. Butler:

Your appeal from the refusal to issue complaint in the captioned cases, charging violations under Section 8 of the National Labor Relations Act, has been duly consider.

The appeal is sustained. It was concluded that under all the circumstances the policies of the Act would not be effectuated by the approval of an informal settlement herein. Accordingly, the cases are remanded to the Regional Director with instructions to set aside the settlement, reissue the complaint and proceed to hearing, absent a formal settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,
Arnold Ordman
General Counsel
By_____
Irving M. Herman
Director, Office of
Appeals

On July 23, the Acting Regional Director issued the consolidated complaint herein. Except for the required changes in dates, the complaint did not vary from that issued on November 20. Specifically, the complaint did not allege any unfair labor practices on the part of Respondents subsequent to the settlement of March 13.

At the opening of the hearing, Respondents moved for approval of the settlement agreement. On October 16,

[1] Resp. Exh. 1.
[2] Attached to G. C. Exh. 2 as Exhs. A and B.
[3] Attached to G. C. Exh. 2 as Exh. C.
[4] Resp. Exh. 3.
[5] This document is, however, a part of the Board's formal files and I have taken administrative notice of it.

1968, the Trial Examiner referred this motion to the Board.

On November 8, the Board denied the motion in a telegram[2] to the parties reading:

| | |
|---|---|
| John F. LeBus, Director<br>NLRB, Region 15<br>New Orleans, Louisiana | Texaco, Inc.<br>Oliver J. Butler, Jr.<br>P.O. Box 52332<br>Houston, Texas |
| C. Paul Barker<br>711 Carondelet Building<br>New Orleans, Louisiana | Plasterers and Cement Masons<br>Local Union No. 685, AFL-CIO<br>203 Jefferson Street<br>Lafayette, Louisiana |

RE: TEXACO, INC., 15-CC-325-1. . 15-CC-325-2. RESPONDENTS MOTION TO APPROVE SETTLEMENT AGREEMENT IS HEREBY DENIED, AND THE PROCEEDING IS HEREBY REMANDED TO THE TRIAL EXAMINER TO TAKE APPROPRIATE ACTION CONSISTENT WITH SECTION 102.45 OF THE BOARDS RULES AND REGULATIONS AND SECTION 101.9 OF STATEMENTS OF PROCEDURE. BY DIRECTION OF THE BOARD:

GEORGE A. LEET
ASSOCIATE EXECUTIVE
SECRETARY

II. THE COMPANIES INVOLVED

Texaco Inc., a Delaware corporation with its principal office and place of business at Wilmington, Delaware, is engaged in the production, processing, transportation and marketing of petroleum and related products, and in connection therewith maintains and operates near Erath, Louisiana, the Texaco's Henry Gas Processing Plant (herein called Henry Gas Plant), where it processes natural gas. In connection with the operation of its Henry Gas Plant, Texaco annually transports or causes to be transported petroleum and related products valued in excess of $50,000 from Erath, Louisiana, to points located directly outside the State of Louisiana.

Dresser Engineering, Inc. (herein called Dresser), an Oklahoma corporation with its principal office and place of business in Tulsa, Oklahoma, is engaged in business as a general contractor in the building and construction industry. In the operation of its business, Dresser annually receives in excess of $50,000 for services performed outside the State of Oklahoma.

At all times material herein, Dresser has been engaged by Texaco as general contractor on the expansion of the Henry Gas Plant. In connection with its construction work on said Henry Gas Plant, Dresser has purchased and received goods and materials from outside the State of Louisiana valued in excess of $50,000 and has received $50,000 in the current year for services performed on the expansion of the Henry Gas Plant.

DuBois Concrete Works, Inc. (herein called DuBois), a Louisiana corporation, is engaged in business as a concrete supplier. In connection with the operation of its business, DuBois has supplied concrete to Dresser for use on the expansion of the Henry Gas Plant.

Dresser, Texaco and DuBois are employers engaged in commerce or in an industry affecting commerce within the

[2] This telegram is not a part of the record in the case. It is a part of the Board's formal file and I have taken administrative notice of it.

meaning of Section 2(6) and (7) of the Act.

III. LABOR ORGANIZATIONS INVOLVED

Respondents Council and Plasterers are labor organizations within the meaning of the Act.

IV. THE UNFAIR LABOR PRACTICES

A. *The Respondent Council*

The complaint alleges that Respondents have been engaged in a labor dispute with Dresser and that, in furtherance of said dispute, the Council has picketed since October 17, 1967, the Henry Gas Plant at Boston and Parish Road, Erath.

L. D. Cason testified that he was area superintendent for Texaco employed at the Henry plant. On or about October 17, 1967, and for 2 or 3 weeks thereafter a picket parked in an automobile was stationed at the corner of Parish and Boston Roads, Erath. It was stipulated that the picket sign read:

> WE ARE PROTESTING SUBSTANDARD AND CONDITIONS OF DRESSER ENGINEERS, LAFAYETTE BUILDING AND TRADES COUNCIL.

The driver, according to Cason, put the picket sign in the windshield of his car and never left the car.[9] It was estimated that the corner of Parish and Boston Roads was between a quarter and a half a mile from the main entrance to the Henry Gas Plant. Carson testified that the majority of the employees living in Erath would drive down Boston Road until they reached the Parish intersection, turn right on Parish and continue in a westerly direction until they reached the main plant gate. Thus, a substantial although unestimated number of the employees would pass the picket car (parked off the roadways) on their way to work.

General Counsel's Exhibit 6, a blue print of the Henry plant, indicates that main access to all portions of the plant was from a blacktop highway abutting the south boundary of the plant and that there were separate gates or entrances providing access from the highway to the Texaco area, the Brown and Root area, Sollay Bros. area and the Dresser area. None of these access roads was picketed by the Council.

This picketing at the Boston and Parish intersection was the sole subject of the complaint against Respondent Council.

B. *The Respondent Plasterers*

As to the Plasterers, the complaint alleges, paragraph 7:

> On or about September 5, 1967, Respondent Plasterers, by and through its agent, Harry. E. Delahoussaye, in furtherance of its dispute with Dresser, referred to in paragraph 5 above, demanded and threatened DuBois to force or require it to cease doing business with Dresser in that he threatened to have his members refuse to handle cement manufactured by DuBois and further to cut off DuBois' cement supply.

James R. Harrell,[10] employed by Dresser as office manager at the Henry plant, testified that DuBois

[9] A picture of the car and its location was received as G. C. Exh. 7.

supplied cement for the Dresser construction operations at the Henry Plant. The first delivery was made on July 23, 1967, and continued to be made in DuBois trucks until August 9. On or about this date, Local 106, Plumbers, established a picket line at the Dresser gate.[10] From this time until September 7, DuBois made no deliveries in its own trucks but "batched out" to Dresser from its plant at Abbeyville. This meant that Dresser would pick up the cement at the DuBois plant in its own trucks and make its own deliveries to the jobsite.

On September 7, Dresser sent its trucks as usual to the DuBois plant but DuBois refused to load them and Dresser received no more cement from DuBois. According to Harrell, DuBois told him, "In view of what happened last night, I can no longer give you any concrete." No further explanation is found in Harrell's testimony.

Lifey DuBois, owner of DuBois, testified that he sold cement to Dresser starting in June, 1967, and that the cement was delivered in his own trucks until sometime in August when he started batching out to Dresser.[11] Early in September DuBois had a conversation in his office with Harry Delahoussaye, business agent of Respondent Plasterers in the presence of one of Dresser's drivers who was there to pick up cement. DuBois testified to this conversation as follows:

Q. Will you please tell us what was said during the conversation between you and Mr. Delahoussaye?

A. What?

Q. What you said and what Mr. Delahoussaye said?

MR. BARKER When was the date? May we fix it?

THE WITNESS: He asked me.

Q. (By Mr. Hopkins) Tell us when it was, about what day it was?

A. The last time, some time in September, maybe six, seven, eight, ten or twelve.

Q. How long before you quit batching out to Dresser?

A. That was it, only that time.

Q. Okay. Tell us what was said?

A. Well, he came to my office and asked me if I quit batching out. I said, "Well, I don't know yet. You see my attorney and see if I am right or not." I said, "I think I am legally right, but I don't know until I find out, I will batch out."

Q. Now —

MR. HOPKINS: I object to Mr. Delahoussaye's side remarks and comments.

TRIAL EXAMINER: I haven't heard him say a word.

Q. (By Mr. Hopkins) Tell us what was said, if anything.

A. We just kept on talking. And then I told him about the business. He said, "Well, one time — " he kept on talking — "you're going to be sorry if you don't."

Q. Don't do what?

A. Don't quit batching out. Right off the bat I asked him what he meant. He said a lot of different things, maybe the cement men could stop finishing cement, if they want, they could, and he explained to me about some other people, too. They done the same thing and

[10] The name appears as corrected the Charging Party's motion to correct transcript.

[11] There is no allegation that this picketing was unlawful.

[11] DuBois did give the reason for batching out instead of delivering cement. We have only Harrell's testimony that it coincided with the establishment of the picket line to indicate a reason.

went out of business.

Q. Did he name anyone specifically, that you recall, that went out of business?

A. I don't remember the name.

Q. Did he refer to a city that you recall?

A. That was Eunice.

Q. In Eunice? What did he say about that?

A. Well, they had one —

MR. BARKER: We object. This had nothing to do with Abbeville or anything. It's over a hundred miles.

TRIAL EXAMINER: I understand that. I assume it is part of the alleged threat to the employer, this conversation.

Proceed.

Q. (By Mr. Hopkins) What did he say about Eunice?

A. Well, that they had went out of business. So then I got through thinking about it, and after that Mr. Trahan called me for some concrete.

TRIAL EXAMINER: Mr. who?

THE WITNESS: Mr. Trahan. He called, said the cement finishers didn't want to finish any cement. "I am going to quit batching out," I said; I called Mr. Delahoussaye but he wasn't there. I got ahold to Mr. Brailey.[1]

Q. (By Mr. Hopkins) What was your conversation with Mr. Brailey?

A. I told him I quit batching out. He said, "That is fine. We'll work your cement."

Q. Did you later call anyone else?

A. Then I got Mr. Delahoussaye later on. He said, "That is fine. Don't worry about your men. We'll furnish you men if Brailey can't find none. I'll find some for you to finish your cement." Which they did.

The reason why I had to quit batching out, it was because I didn't have enough work with the Texaco.

DuBois had another conversation with Delahoussaye in November, 1967. Delahoussaye was accompanied by Father Swenson, a Catholic priest. With respect to this conversation, DuBois testified:

Q. (By Mr. Hopkins) Mr. Dubois did Mr. Delahoussaye tell you why he brought the priest?

A. No, sir.

Q. Did Mr. Delahoussaye have anything with him, other than the usual what we would expect — did he have any documents with him?

A. I don't know.

MR. BARKER: I object to that question.

TRIAL EXAMINER: I can't make much sense out of it.

Q. (By Mr. Hopkins) Did he bring anything that he showed to you?

A. Some kind of paper. What was on it, I don't know.

Q. Where did the paper come from, if you know?

A. He had it with him.

Q. He had it with him, and what did he say about this paper?

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[1]Brailey, not a witness, was identified by George Trahan, engaged in the lumber and homebuilding business, as the owner of the Brailey Concrete Works in Abbeyville. When other employers in the construction industry needed cement finishers it was their custom, according to Trahan, to call Brailey who would furnish them. It was stipulated that Brailey acted as area steward for Respondent Plasterers and Delahoussaye testified that when he needed men he would call Brailey who would send them as directed. I find that Brailey acted as agent for the Respondent Plasterers in referring cement finishers for employment.

A. Well, what he asked me, he say, "I don't believe I said that." I said, "That is what you told me."

Q. What did he refer to at that point when he said "I don't believe I said that"?

A. Oh, well, to me it just didn't say it. I said "Yes."

Q. What was it he says he didn't say?

A. He told me, he says, "You're going to be sorry." I said, "What do you mean?" Well, he said, "Them finishers could quit finishing your cement."

Q. This was in the paper he brought to you?

A. Oh, no, sir. I didn't see it. I don't think so.

Q. Is that what he was asking about, if you said that?

A. No, I didn't get you there?

TRIAL EXAMINER: I'm not sure I do either.

MR. BARKER: I have an objection to the leading questions.

TRIAL EXAMINER: I know you have.

MR. HOPKINS: It is his witness. I am developing.

MR. BARKER: That's all right, you're heading him in the wrong direction.

MR. HOPKINS: That is to be argued later.

TRIAL EXAMINER: You may be developing some questions — proceed.

Q. (By Mr. Hopkins) Was anything mentioned about you would be sorry, during this conversation when the priest was there? Anything — any mention made of that?

A. Not another thing, no. Just now that they could quit finishing cement, and they maybe could have them obtain my supply, cut it off.

Q. Did Mr. Delahoussaye say he hadn't told you that?

A. No, not by any material, no, sir.

Q. But about you would be sorry?

A. Yes, sir.

Q. What did you tell him?

A. I told him "Sure."

Q. Sure, what?

A. That he had told me that.

MR. HOPKINS: I have nothing else. Thank you.

Harry Delahoussaye testified that he first learned of a dispute between Dresser and any labor organization in August 1967, when the picket line was established by Local 106. Respondent Plasterers had no dispute with Dresser, Texaco or DuBois. Delahoussaye learned of the line from Brailey, who also told him that DuBois was batching to Dresser and that "the men were very distrubed about it." Delahoussaye then went to see DuBois and fixes the date as about August 29. DuBois' wife was present and Delahoussaye mentions the Dresser truckdriver. Delahoussaye's version of their conversation reads:

Q. And can you tell us what you said and what Mr. Dubois said?

A. Right. To the best of my knowledge I arrived at his office and we had the regular informalities of meeting and greeting one another. I told him I would like to have a word with him. I wanted to talk with him. He said, "Okay." We sat down at his desk and I told him, I said, "I had a call from the men. They were distrubed about the fact you was doing, batching concrete for the Dresser job." I then asked him of what his intentions were, if he was going to continue in the future. He said, "Yes." and he told me that if I stopped the other people from doing business with Dresser then

he would cease doing business with Dresser. I told him I didn't have nothing to do with the other people. Then the conversation kind of broke off, that is when the truckdriver came in. We talked about previous pickets. He said he wouldn't respect our picket line out there I told him I don't know nothing about the picket line, I imagine it was on wages and conditions but the laborer who was out there — he told me that he had been promised a job by the ironworkers on a previous picket line.

Q. Who told you this?

A. Truckdriver.

Q. The truckdriver?

A. Uh-huh. I told him I didn't know nothing about it. I took his name and told him I would check into it and he told me that he was making three and a half an hour — the truckdriver.

Q. Was Mr. — to interrupt you just a moment was Mr. Lifey Dubois listening at this conversation?

A. Yes, sir, he was present.

Q. Was he in a position to hear you say you had - you knew nothing about any picket line out there?

A. Yes, sir. He was sitting about here to Brailey (Indicating) and I —

Q. Now, did Mr. Dubois say anything about what would happen if he quit batching for Dresser?

MR. HOPKINS: I object to the leading, Your Honor. I object.

TRIAL EXAMINER: The question has already been asked. What do you want me to do, ask him to rephrase it?

THE WITNESS: Mr. Dubois then asked me what would the union do or what could the union do if they continued batching and Mr. Dubois said the cement finishers would refuse to refinish concrete.

Q. (By Mr. Barker) Who said that?

A. Mr. Dubois. Mrs. Dubois looked at me and said, Mr. de la Houssaye isn't that against the law?" I told her the men could refuse as individuals but the union was not refusing to supply men. Then, the conversation went on to them losing men on the job. I told Lifey, "If you are losing money on the deal, you are in business to make money. I will back up my trucks and deliver the concrete." He said, "No, I am a union man for twenty years." I said, "Lifey, it doesn't matter, you are a business man. You are in business. If I were you I would back up my trucks over there and deliver the concrete." and I left right there.

Q. Are you certain it was Mr. Dubois who said the finishers would refuse to continue to finish Dubois concrete?

A. Right.

Q. This was after Mrs. Dubois asked you what the union would do if they continued batching?

A. Yes.

On or about Thursday, Setember 7, Delahoussaye received a telephone call from DuBois in which DuBois told him he had stopped batching to Dresser. Delahoussaye told him he would tell the men. The next night Delahoussaye received a call from Brailey who told him DuBois wanted to see him. This conversation on this occasion related to difficulties DuBois was having with other jobs and, apart from DuBois' reaffirmance of his decision not to batch to Dresser, does not contribute to the instant dispute.

Finally, as to the November conversation, Delahoussaye testified:

Q. What was the occasion for your going having a conversation with him on that date?

A. The occasion coming out of the lawsuit and Board charges and so forth. I asked Father Swenson to come with me as a witness and after we exchanged the formalities of greetings, etc. with Mr. and Mrs. Dubois, I explained to them the reason for Father Swenson's presence. I didn't want them to even think in any way I was over there to intimidate them or threaten them or to coerce them in any manner, shape or form. All I wanted was to go over the conversation we had previously and so to find out just whatever it was I said to the best of their ability. I didn't remember threatening them in any way, shape or form and we went over several parts of the conversation and it was agreed by all three of us in there that this was what was said. I asked Mr. Dubois if what at any point did I threaten him. He told me, "None.". Mrs. Dubois then stated, she says, "Yes, you told him. You said you would be sorry." I told him that I didn't remember any such statement.

Q. Did you remind her of what you had said about losing money?

A. Yes. Oh, Yes. We went over that.

Q. What did you tell her on that?

A. Exactly the same thing, the same conversation when it was brought up about losing the money. I told Mr. Dubois, if it was me out losing money, I would back up my trucks, fill them up and deliver concrete on the job. I had the same conversation we had before.

Q. Did Mr. Dubois say, say anything about the impression she had been left with?

A. Right. She said, I certainly left her with that impression. Father then asked them a question.

Q. What did he ask them?

A. He asked Mr. Lifey — I forget exactly how he phrased the question but he asked if at any time did I do anything of these things, threatening or coercing them and so forth. Mrs. Dubois said, "No." Mrs. Dubois then said I left her with that impression. I asked her — I asked Mrs. Dubois "If your place would have been bombed that night, would I have left you with the impression I would have done it?" She says, "No.".

Q. Please go over that part of the conversation on the previous occasion when Mr. Dubois said the finishers would refuse to finish their concrete.

A. Yes, sir. We went over the entire conversation.

Q. What did Mrs. Dubois say, if you recall?

A. She said she was in agreement.

Q. Did you say anything about the individuals refusing to work?

A. You see we went over that part of the conversation where she she said, "What could the union do if they continued making — Mr. Dubois refused the contract." She looked at me and said, "Mr. de la Houssaye, isn't that against the law?" I said, "The men can do it as individuals but as a union we are not refusing."

Q. Did Mrs. Dubois agree or disagree that is how the conversation had gone?

A. She agreed because in the effect I wanted them to help me remember the conversation, what was said because I could not remember at any point where I would have threatened or coerced them at any point.

Q. Did you say anything about calls to your office?

A. Yes.

Q. What did you say about that?

A. The men refused over there. He should have called the office. He says, "Mr. de la Houssaye, what for?" I told him I would send you some other men from New Iberia and Lafayette. New Iberia and Lafayette is going to refuse if the men in Abbeyville refuse.

Q. What did he say about that, about the charges and the lawsuit?

A. He said not to worry about it, nothing to it.

Q. Did the conversation end in the office there?

A. No, he followed us to the car. We got into the car. We got seated in the car. He asked – Mr. Dubois asked me to return the next day to talk with him and I refused. He asked me in the presence of Father Swenson.

This concludes the testimony relevant to the charge against the Respondent Plasterers.

### B. *Conclusions*

The Board's Order of November 8, clearly precludes the Trial Examiner from considering Respondents' plea that compliance with the settlement agreements requires dismissal of the complaint herein. Whatever equities may rest with Respondents, and they appear to be considerable, they are not now arguable before the Trial Examiner.

As to Respondent Lafayette I find that by placing a picket sign on the windshield of a car parked at Boston and Parish Roads some quarter mile or more from the plant Respondent Council violated Section 8(b)(i) and (ii)(4)(B) of the Act. This picketing did not conform to the Moore Dry Dock standards.[14] Conformance to those would have required that the picketing (or the picket sign) be confined to the Dresser gate. Respondents elected to address its inducement to employees at a point passed by employees of employers other than Dresser and by so doing fell within the interdiction of the Act.[15]

The case of Respondent Plasterers is more difficult. It relies almost exclusively on the testimony of DuBois, given in a patios and with an accent with which the Examiner is unfamiliar. The lengthy quotes from the testimony of both DuBois and Delahoussaye are included to make this difficulty clear.

Scrutinizing DuBois' testimony, it appears that if any threat was made by Delahoussaye it was on the occasion of the visit on or about August 29 after Delahoussaye had heard, through Brailey, that a picket line had been established at Texaco (at the Dresser gate) and that DuBois was batching concrete and "the men were very distrubed about it."[16] DuBois was asked by Delahoussaye if he was going to quit batching and DuBois said he did not know. He was then told that he would be sorry if he did not. When DuBois asked him what he meant, Delahoussaye told him the men could stop finishing cement (a remark Delahoussaye attributes to DuBois himself) and made reference to other employers who had gone out of business. Sometime later, DuBois called Brailey and told him he had quit batching and later told Delahoussaye the same thing. DuBois was told by Brailey that he would finish his cement and Delahoussaye told

[14] *Sailors Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

[15] *Local Union No. 1692, International Longshoremen's Association, etc., (J. & R. Contractors, Inc.,)*, 127 NLRB 1567.

him he would furnish him with men. There is, however, nothing in DuBois' testimony to indicate that Brailey or Delahoussaye either threatened to stop furnishing him with men or refused to furnish him with men. DuBois only testified that Delahoussaye told him "maybe the men could stop finishing cement." Since the difficulty, whatever it was, seems to have been between DuBois and the men I cannot distort this testimony into a threat by Delahoussaye that the Respondent Plasterers would take any action. At the conclusion of his testimony respecting this conversation, DuBois stated that the reason he quit batching was that he did not have enough work for the men.[17]

I am unwilling to make a finding of a violation of the Act on testimony as unclear and incoherent as that of DuBois. The only clear indication that any threat was made is his testimony that Delahoussaye told him he would be sorry if he did not quit batching. This statement was denied by Delahoussaye, at least to the extent that he could not remember making it. I do credit Delahoussaye's testimony that DuBois answered his own question as to what would happen if he did not stop batching by saying the men could stop finishing.

Apart from what I consider a failure to establish a violation by a fair preponderance of the credible testimony, the instrinsic logic in the situation favors the Respondent Plasterers. It had no quarrel with any employer at Texaco and it is nowhere shown that it acted in concert with Local 106 or in response to any request from Local 106. Delahoussaye, on uncontradicted testimony, was responding only on behalf of "the men." The statement that DuBois would be sorry could have meant, as DuBois suggested, that the men would stop finishing without any action or instigation on the part of Respondent Plasterers.

For these reasons, it shall be recommended that the complaint against the Respondent Plasterers be dismissed.

## IV. THE REMEDY

Having found the Respondent Council engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom.[18]

Since Respondent Council has previously posted the usual notices to its members for the required period it will not be recommended that the notices be reposted.[19] The policies of the Act would hardly be served by duplication. One pound of flesh is all that is required.

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[17] Who these men were is not disclosed. Presumably they were the cement finishers in the area who were members of Respondent Plasterers and who were referred to jobs by Brailey. Whether the men who worked for DuBois were "disturbed" is not shown.

[18] Delahoussaye's testimony, *supra*, refers to a discussion, far from clear, in which DuBois complained about losing money on the Texaco (Dresser) job.

[19] The record herein indicates that there has been no picketing by Respondent since November, 1967. The recommended order directs the Respondent to cease and desist from conduct which it ceased and from which it desisted more than 1 year ago. The Examiner asked the General Counsel, in view of compliance with the settlement agreements, what remedy he would gain in this proceeding. General Counsel responded, "In the absence of a formal settlement we are proceeding as we were told to."

[20] Respondents' counsel stated at the hearing that Respondents had posted the notices required by the settlement agreements for the full 60-day period and the statement was not contradicted. Respondents' counsel is an eminent and respected member of the Louisiana Bar and I give his statement made during the hearing the same weight I would give sworn testimony.

Nor will I require the Respondent Council to notify the Regional Director what steps it has taken to comply with the recommended order which is negative in its requirement. If unlawful picketing is resumed, it is likely that the Region will be informed.

Upon the foregoing findings and conclusions and upon the entire record in this case, I make the following:

## CONCLUSIONS OF LAW

1. By establishing a picket sign at Boston and Parish Roads some distance from the access to the Henry Gas Plant, Respondent Council violated Section 8(b)(i)(ii)(4)(B) of the Act.
2. The aforesaid labor practices were unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
3. Respondent Plasterers did not violate Section 8(b)(4)(ii)(B) of the Act.

## RECOMMENDED ORDER

It is recommended that Respondent Council, its officers, agents, successors, representatives and assigns shall cease and desist from engaging in, or inducing any individual employed by DuBois, Texaco, or any other person engaged in commerce or in a business affecting commerce to engaged in a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or threatening, coercing or restraining DuBois or any other person engaged in commerce or in a business affecting commerce with the object of forcing DuBois, Texaco, or any other person to cease doing business with Dresser.

IT IS FURTHER RECOMMENDED that the complaint against Respondent Plasterers be dismissed in its entirety.

# APPENDIX F

**NLRB v. BUILDING TRADES COUNCIL (Texaco, Inc.)**

**U. S. Court of Appeals, Fifth Circuit (New Orleans)**

NATIONAL LABOR RELATIONS BOARD v. LAFAYETTE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. 29722, July 1, 1971

Application for enforcement of an NLRB order (71 LRRM 1591, 176 NLRB No. 137). Order enforced.

Daniel M. Katz (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet - Prevost, Assistant General Counsel, Abigail Cooley Baskir, and David E. Rosenbaum, on brief), for petitioner.

Jerry L. Gardner, Jr. (C. Paul Barker, Dodd, Hirsch, Barker & Meunier, on brief), New Orleans, La., for respondent.

Oliver J. Butler, Jr., and Obediah R. Miller, Houston, Tex., for Texaco, Inc.

Before BROWN, Chief Judge, and WISDOM and RONEY, Circuit Judges.

*Full Text of Opinion*

RONEY, Circuit Judge:—This is an application for enforcement of an order of the National Labor Relations Board arising out of union activities at Texaco, Inc.'s Henry Gas Processing Plant near Erath, Louisiana. In a consolidated case based upon two distinct matters, the Board found that respondent Lafayette Building and Construction Trades Council, AFL-CIO (Council) had violated Section 8(b), 4(i) and (ii) (B) of the National Labor Relations Act, as amended, and that Plasterers and Cement Masons Local Union No. 685, AFL-CIO (Plasterers) had violated

Section 8(b), (4) (ii) (B) of the Act.[1] We enforce the Board's order.

**I. Lafayette Building and Construction Trades Council**

For about 2 or 3 weeks in October, 1967, a picket was parked in a truck at the corner of Parish and Boston Roads, Erath, Louisiana. A sign in the truck window read: "We are protesting substandard wages and conditions of Dresser Engineers, Lafayette Building and Trades Council." Dresser Engineering was the general contractor at the Henry Gas Plant expansion. The Henry Gas Plant was located between ¼ to ½ mile down Parish Road from the truck with the sign. A majority of workers at the construction site would pass the intersection at which the truck was parked. Dresser had a separate gate for its workers and suppliers. There was sufficient room for persons to picket at that gate and in fact pickets had done so.

Based upon these largely undisputed facts, the trial examiner found that the Council "elected to address its inducement to employees at a point passed by employees of employers other than Dresser and by so doing fell within the interdiction of the Act." The Board agreed with this finding.[2]

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[1] 29 U.S.C. 158(b)(4)(i)(ii) (B). "Section 8(b)(4) of the amended Act makes it an unfair labor practice for a union—

(i) to engage in or to induce or encourage any individual * * * to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, material or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *; Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

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[2] One member of the Board dissented but the dissent was based upon "the minimal nature of the violations," not upon the view that no violations occurred.

Section 8(b) (4) meets "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675, 692, 28 LRRM 2108 (1951). It reflects a positive policy which developed as a result of the "great public dissatisfaction with the hapless predicament of the secondary employer caught in the middle." Superior Derrick Corp. v. N.L.R.B., 273 F.2d 891, 45 LRRM 2506 (5th Cir. 1960), cert. den., 364 U.S. 816, 46 LRRM 3080 (1960).

It has previously been pointed out that "the line between primary and secondary activity is relatively easy to draw where the primary and secondary employers have separate work sites." A more difficult problem is presented here where two employers are performing separate tasks on common premises. Markwell and Hartz, Inc. v. N.L.R.B., 387 F.2d 79, 86, 66 LRRM 2712 (5th Cir. 1967) (dissenting opinion).

In order to evaluate whether picketing is permissibly primary or improperly secondary, the Board has developed criteria relating to conduct at a common situs. Sailor's Union of the Pacific (Moore Drydock Co.), 92 NLRB 547, 27 LRRM 1108 (1950). Thus the Board stated:

> "In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) At the time of the picketing the primary employer is engaged in its normal business at the situs; (c) The picketing is limited to places reasonably close to the location of the situs; and (d) The picketing discloses clearly that the dispute is with the primary employer." Id. at 549.

Since a common situs is involved here, the Moore Drydock rules are applicable. The trial examiner found, and the Board agreed, that the picketing did not conform to the Moore Drydock criteria in that the picketing should have been confined to the

Dresser gate. Since there is undisputed evidence that Dresser had a separate gate and that there was sufficient room for picketing there, the decision of the Board is supported by substantial evidence.[8] The picketing was not "conducted in such a way that the normal appeal of the picket line [was] overcome" and was not "done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure of secondary employees on that secondary employer." Superior Derrick Corp. v. N.L.R.B., supra, at 897; Brown Transport Corporation v. N.LRB, 334 F.2d 30, 56 LRRM 2670 (5th Cir. 1964).

**II. Plasterers and Cement Masons Local Union No. 625**

DuBois Concrete Works, Inc. supplied concrete to Dresser for use on the expansion of the Henry Gas Plant. From June 23, 1967 to August 8, 1967, the concrete was delivered to the Gas Plant by DuBois' trucks. At about that time Local 106, Plumbers, began picketing at the Dresser gate of the Henry Gas Plant. Thereafter DuBois made no deliveries to the Gas Plant, but instead Dresser would send its trucks to DuBois' facilities to obtain concrete, a procedure called "batching out."

Thereafter occurred a conversation between Lifey DuBois, owner of DuBois Concrete Works, and Harry Delahoussaye, business agent for Plasterers. DuBois testified that Delahoussaye came to his office between September 6 and 12, 1967, to inquire if DuBois had quit batching out. DuBois stated that Delahoussaye said that if DuBois had not stopped batching out he was going to be sorry. He further testified that Delahoussaye then mentioned different things that could happen, such as men refusing to finish cement and that other people had gone out of business for doing the same thing.

Delahoussaye testified that the conversation took place around August 29, 1967. He told DuBois that the men were disturbed about the batching of concrete for Dresser and asked his future intentions. DuBois indicated he was going to continue batching out.

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[8] The record contains no evidence presented on behalf of Council.

Delahoussaye testified that DuBois then asked what would happen if he continued batching and DuBois answered his own question by saying that the cement finishers would refuse to finish cement. Mrs. DuBois then asked if that wasn't against the law, to which Delahoussaye replied that the men could refuse as individuals but that the union could not refuse to supply men.

The trial examiner found no unfair labor practice. He thought that any violation depended almost exclusively upon the testimony of DuBois. To him the testimony was unclear and incoherent because it was given in a patois with an accent unfamiliar to the examiner. The trial examiner credited Delahoussaye's testimony.

The Board disagreed with the trial examiner, did not find the testimony of DuBois unclear and did not believe that the violation rested exclusively upon his testimony.

The question for this Court is whether on the record as a whole there is substantial evidence to support the Board's findings. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 27 LRRM 2373 (1951) Universal Camera also determined the application of that standard to the situation presented here of a finding by the Board contrary to a finding by the trial examiner. The Supreme Court stated, at p. 496:

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidences' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course depends largely on the importance of credibility in the particular case. To give it this significance does not seem to use materially more difficult than to heed the other facts which in sum determine whether evidence is 'substantial'."

Credibility played no significant part in the decision of the Board. The only clear credibility choice made by the trial examiner between Delahoussaye and DuBois related to who stated

the consequences of continued batching out. In the Board's view that choice was immaterial to the decision. In any event, any such credibility choice made by the trial examiner could well be questioned because of his admitted inability to understand DuBois cajun patois.

The Board based its finding not only upon DuBois' testimony but upon a consideration of all the testimony.[3a] There was substantial evidence on the whole record to support the Board's finding "that Delahoussaye did threaten DuBois that respondent's members would not work his cement unless he quit batching out to Dresser, with an object of forcing or requiring DuBois to cease doing business with Dresser, and that by such conduct respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act."

**III. Setting Aside of Informal Settlements**

The Unions contend that the Board should not have set aside informal settlement agreements which would have resolved the matter without findings of unfair labor practice.

The original charges of unfair labor practice in both of these cases were filed by Texaco, Inc. on October 19, 1967. On March 13, 1968, both respondents entered into the informal settlement agreements, which were approved by the Acting Regional Director of the NLRB. The agreements called for withdrawal of the complaints by the Board in return for the posting of certain notices and the refraining from certain conduct by Unions.

Texaco, the charging party, did not execute the settlement agreements. On the contrary, on March 24, 1968,

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3a Shortly after Delahoussaye's conversation with DuBois, one of DuBois' customers called DuBois and cancelled an order for cement. This was done because the area steward for Plasterers had called the customer and told him that no cement finishers would be provided to him because DuBois, his supplier, was batching out. The customer so advised DuBois, who announced that he would stop batching out. The customer and DuBois told the area steward for Plasterers of that fact and were informed that cement finishers would resume working DuBois' cement.

Texaco objected to the settlements but appealed to the General Counsel in accordance with Section 102.19 of the Board's Rules and Regulations.[4] The Unions were advised of the appeal by letter dated March 25, 1968, from the General Counsel. On July 16, 1968, the appeal was sustained and the settlements were set aside. The Regional Director issued a new complaint on July 23, 1968, similar to the complaints which had been withdrawn. On that same day the Unions' attorney wrote the Regional Director advising that he was writing the General Counsel to request reconsideration within the 10 day period provided by Section 102.19(a) of the Board's Rules and Regulations. The

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4 29 C.F.R. § 102.19: "Appeal to the general counsel from refusal to issue or reissue.

(a) If, after the charge has been filed, the regional director declines to issue a complaint, or having withdrawn a complaint pursuant to § 102.18, refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D.C., and filing a copy of the appeal with the regional director, within 10 days from the service of the notice of such refusal to issue or reissue by the regional director, except as a shorter period is provided by § 102.81. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. A request for extension of time to file an appeal shall be in writing and be received by the general counsel, and a copy of such request filed with the regional director, prior to the expiration of the filing period. Copies of the acknowledgement of the filing of an appeal and of any ruling on a request for an extension of time for the filing of an appeal shall be served on all parties. Consideration of an appeal untimely filed is within the discretion of the general counsel upon good cause shown.

(b) Oral presentation in Washington, D.C. of the appeal issues may be permitted a party on written request made within 4 days after service of acknowledgment of the filing of an appeal. In the event such request is granted, the other parties shall be notified and afforded, without additional request, a like opportunity at another appropriate time.

(c) The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 10 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence."

letter to the General Counsel was never sent as it appeared to the Union's counsel to serve no useful purpose in view of the reissued complaints. The Board states that the Unions' attorney advised the Regional Director on July 31 that he would not move for reconsideration.

Prior to the hearing on the unfair labor practice violations, the Unions made a motion for approval of the settlement agreements. The trial examiner referred the motion to the Board which denied the motion and remanded the matter to the trial examiner. In its exceptions, the Unions renewed its motion and the Board again refused to approve the settlements.

The Unions argue that the Board abused its discretion in failing to approve the agreements in that the Unions had already acted in reliance on them. Any such reliance was unjustified. The agreements were never executed by Texaco, Inc. Although such settlements can be effectuated by approval of the Board's Regional Director if no objection is made by the charging party, here the charging party appealed the approval. In such event, as stated therein, the agreements are contingent upon the General Counsel sustaining the Regional Director's action. Therefore, performance by the Unions was not required, and if begun, was clearly at the risk that the General Counsel would refuse to approve the Regional Director's action. Assuming *arguendo* that such action by the General Counsel is reviewable by this Court under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) (f), there has been no showing of any abuse of discretion by the General Counsel or the Board.

The Unions also contend that they were denied due process because they did not receive a full hearing on the question of approval of the settlements. We see no fundamental unfairness in the proceedings complained of. The Unions presented their contentions to the Board on two occasions and the Board refused to approve the settlements. The result of such disapproval was a full hearing for all sides on the alleged unfair labor practice violations. Under the circumstances presented here, there is no violation of due process.

ENFORCED.

# APPENDIX G

[RESPONDENT'S EXHIBIT 2]

[Caption Omitted in Printing]

WESTERN DISTRICT OF LOUISIANA
FILED
DEC 1 : 1967
ALTON L. CURTIS, CLERK
By: ..... Deputy

Civil No. 13,375

STIPULATION

A petition having been filed pursuant to Section 10(1) of the National Labor Relations Act, as amended, for a temporary injunction,

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, subject to the approval of the court, that:

1. Pending the final disposition of the matters involved pending before the National Labor Relations Board (herein called the Board), the Lafayette Building and Construction Trades Council, AFL-CIO (herein called Respondent Council) and the Plasterers and Cement Masons Local Union No. 685, AFL-CIO (herein called Respondent Plasterers), their officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, will not engage in the following acts and conduct:

A. Respondent Council will not:

Picket at or in the vicinity of the premises of the Texaco's Henry Gas Processing Plant on Parish Road and off of Boston Road near Erath, Louisiana, or in any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engage in, induce, or encourage any individual employed by Texaco, DuBois and other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment, to use, manufacture,

process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform any service, or in any manner, or by any means, threaten, coerce, or restrain Texaco, DuBois, or any other person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is to force or require Texaco, DuBois, or any other persons to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with Dresser.

B. Respondent Plasterers will not:

Threaten, coerce, or restrain DuBois, Texaco, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require DuBois, Texaco, or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with Dresser.

2. In the event that the Regional Director of the Fifteenth Region of the Board, after investigation of an alleged violation by Respondent Council of any of the provisions of paragraph 1(A) of this Stipulation or alleged violation by Respondent Plasterers of any of the provisions of paragraph 1(B) of this Stipulation, subsequent to the execution thereof, has reasonable cause to believe that a violation has been committed, then upon the filing of an affidavit by him to that effect, the Court may upon not less than 48 hours notice bring the matter on for hearing.

3. This case shall in the meantime remain on the docket of this Court. Upon compliance by Respondents with their obligations undertaken here under, and upon the final disposition by the Board of the matters pending before it as aforesaid, the Petitioner shall cause this proceeding to be dismissed.

4. The making and execution of this Stipulation shall not be construed as an admission that Respondents have engaged in the unfair labor practice charged.

Dated at Lafayette, Louisiana, this 30th day of November 1967.

/s/ Charles M. Paschal, Jr.
Attorney for Petitioner

/s/ C. Paul Barker
Attorney for Respondents
Dodd, Hirsch, Barker & Meunier
711 Carondelet Building
New Orleans, Louisiana 70130

Approved and so ordered this 5th day of December 1967.

/s/ R. J. Putnam
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
This is to certify that the above and foregoing contained on this and preceding 2 pages is a true and correct copy of the original.

12-11 1967
ALTON B. CURTIS, CLERK

By Melvin R. Comeaux
Deputy Clerk

# APPENDIX H

**EXHIBIT B**

[Caption Omitted in Printing]

## SETTLEMENT AGREEMENT

Case No. 15-CC-325-2

The undersigned labor organization (herein called the Union) and the undersigned charging party (herein called the Charging Party), in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE--Upon approval of this Agreement, the Union will post immediately in conspicuous places in and about its offices, including all places where notices to members are customarily posted, and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice to All Members attached hereto and made a part hereof. The Union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

COMPLIANCE WITH NOTICE--The Union will comply with all the terms and provisions of said Notice.

~~XXXX

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# NOTICE TO ALL MEMBERS

## PURSUANT TO

A SETTLEMENT AGREEMENT

APPROVED BY THE REGIONAL DIRECTOR, FIFTEENTH REGION OF THE

## NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

## NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our members that:

WE WILL NOT threaten, coerce, or restrain DuBois Concrete Works, Inc., or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is forcing or requiring DuBois Concrete Works, Inc., or any other person to cease or refrain from using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Dresser Engineering, Inc., at its Erath, Louisiana, jobsite.

PLASTERERS AND CEMENT MASONS LOCAL UNION NO. 685, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Title)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 9U24 Federal Building (Loyola) 701 Loyola Avenue, New Orleans, Louisiana 70113. Telephone: 504 527-6391

# APPENDIX I

[RESPONDENT'S EXHIBIT 3]

March 20, 1968

Re: Lafayette Building & Construction Trades Council, AFL-CIO, and Plasterers and Cement Masons Local Union No. 685, AFL-CIO
(Texaco Inc., Erath, Louisiana)
NLRB Cases No. 15-CC-325-1 and -2
NO-157-67

General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.E.
Washington, D.C. 20570

Dear Sir:

By letter dated March 14, 1968, above subject, the Regional Director for the Board's 15th Region has advised the undersigned as follows with respect to the subject cases:

> "As a result of the investigation, and in view of the undertaking contained in the attached settlement agreements, it does not appear that it would effectuate the purposes of Act to institute further proceedings at this time. I am, therefore, refusing to issue a new complaint in this matter."

In such letter the Regional Director has further advised that review of his action may be obtained by filing an appeal with you.

Since Complaint and Notice of Hearing has already been issued against the respondent Unions in the subject cases, and since Texaco (the charging party) has not sought the issuance of any "new" complaints in such cases, the above quoted advice from the Regional Director would appear on its face to be somewhat pending. However, based on the fact that

the Regional Director has heretofore advised the undersigned of his tentative intention to dismiss the previously issued Complaint against the respondent Unions and to effectuate informal settlement agreements with the respondent Unions, and in view of the reference to "settlement agreements" in the above quoted advice is to inform Texaco that he has now made a final determination to take such action-- even though Texaco has heretofore voiced its vigorous objection to any such action.

In the circumstances, and without in any manner waiving the right to seek judicial recourse, Texaco herewith renews its objection to the proposed action of the Regional Director and requests that you direct the Regional Director to forthwith proceed to Hearing on the Complaint heretofore issued in the subject cases.

As the Regional Director has previously been advised, Texaco cannot and will not agree to disposition of the subject cases by informal settlement agreement. Further, as the Regional Director has previously been advised, Texaco respectfully challenges the authority of the Regional Director to effectuate informal settlement agreements in the subject cases without the consent and approval of Texaco.

As was pointed out by the United States Court of Appeals for the Third Circuit in Leeds & Northrup Company v. NLRB, et al., 357 F(2d) 527, 61 LRRM 2283 (CA 5, 1966):

> "Clearly, once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious. . . . if an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all the parties, after the issuance of a complaint, then such informal proceeding must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review.

* * * * *

". . . Final disposition of complaint was reposed by Congress in the Board itself. See: Section 3(d) of the Act, 29 USC §153(d).

". . . withdrawal of a complaint by the Regional Director 'on his own motion' under Rule 102.18 . . . would usurp the statutory authority of the Board. . . .

* * * * *

"Even the Board's own regulations impose a limitation on the authority of the Regional Director, or General Counsel, to negotiate an informal or formal settlement agreement with a charged party. Considering Section 3(d) of the Act in the light of section 101.9 of the regulations, it appears that neither Congress nor the Board, by statute or regulation, intended to vest in the Board's agents, the Regional Director and the General Counsel, power and authority to settlement complaints after their issuance without the consent of all parties, including the charging party. . . ." [emphasis added]

Plainly and manifestly, the Court's decision in the Leeds & Northrup case--as to which judicial review was not sought by the Board--makes it clear that although the Regional Director, acting for the General Counsel, may in his discretion choose to issue or not to issue a Complaint based on unfair labor practice charges, once a Complaint is issued he does not have the discretionary authority to dismiss such Complaint and effectuate a settlement agreement with the charged party absent the consent and approval of the charging party. Yet, this is the very type of unauthorized action which the Regional Director proposes to take in the subject cases.

In view of the posture of the law with respect to the unauthorized action which the Regional Director proposes to take, it would seem clear that Texaco need not even state any reasons for its objections to such proposed action. Merely to point out the unauthorized nature of such proposed action should suffice. However, the reasons for Texaco's objections should be apparent to anyone familiar with the subject cases and with the applicable law. And, further, such reasons have previously been outlined to the Regional Director.

Thus, as the Regional Director has previously been advised, Texaco is frankly shocked that the Regional Director would even consider resolution of the subject cases by informal settlement agreement--even if he possessed the authority to do so--in view of the over-all nature and flagrancy of the unlawful conduct of the respondent Unions, the climate of fear and intimidation within the framework of which such unlawful conduct occurred, the continuing existence of such climate of fear and intimidation, and the complete absence of any effective means to enforce an informal settlement agreement in the event of violation thereof.

Examining the above points, one by one, let us look first to the nature and flagrancy of the unlawful conduct of the respondent Unions which is encompassed by the Complaint in the subject cases. Clearly, such unfair labor practices are textbook examples of flagrant and definant secondary boycott activity.

Thus, as to the respondent Lafayette Building & Construction Trades Council, the evidence upon which the Complaint is based clearly establishes unlawful picketing at a main highway intersection approximately one-quarter mile from the entrance to Texaco's plant near Erath, Louisiana--even though there was a reserved gate at such plant for the non-Union contractor with whom the Council purportedly had a dispute. In this connection, it is noteworthy that such reserved gate had previously been picketed and has subsequently been picketed (in fact, is now being picketed), thus clearly evidencing that the Council could have engaged in lawful primary picketing but for its obvious desire and flagrant

intention to intimidate any and all persons who might have the temerity to do business either with Texaco or its despicable non-Union contractor.

As to the respondent Plasterers and Cement Masons Local Union No. 685, the evidence upon which the Complaint is based clearly reflects not only unlawful threats of dire consequences against a supplier of Texaco's non-Union contractor unless such supplier ceased supplying materials for Texaco's construction job but also reflects the actual carrying out of such threats--with the result that such supplier forthwith ceased supplying.

Certainly such unfair labor practices by the respondent Unions were neither "isolated" nor "insignificant". In fact, as a result of such unlawful action Texaco incurred actual damages of $134,000--for which suit was filed against such Unions by Texaco in federal court, with an Entry of Default having been recorded against such Unions.

Let us look next to the climate of fear and intimidation within the framework of which the unlawful conduct of the respondent Unions occurred--which climate of fear and intimidation continues to exist.

It is public knowledge, and the Regional Director is well aware, that for many months a reign of terror has existed in southern Louisiana as a result of Union violence and intimidation. Such reign of terror--which has encompassed not only picketing and secondary boycott activity but also threats, shootings and bombings--has resulted inter alia in the formation of a special legislative investigating committee and in concerted and intensified investigative efforts by federal, state, and local law enforcement agencies. As an interim result, within recent weeks five Union leaders in the Lafayette area have been arrested and charged with some twenty-one bombings--at least one of such persons being associated with the respondent Lafayette Building & Construction Trades Council.

As noted above, it is within the framework of this climate of fear and intimidation that the unlawful conduct encompassed by the Complaint in the subject cases occurred. For example, as the Regional Director is well aware, immediately prior to the occurrences which are encompassed by the Complaint in the subject case two automobiles belonging to the job superintendent of Texaco's non-Union contractor were bombed while parked at his residence. And, as the Regional Director is also well aware, both before and after the occurrences which are encompassed by the Complaint in the subject cases there were bombings not only of Texaco's property but also of the property of several local businessmen who were supplying Texaco and its non-Union contractor. Also, as the Regional Director is well aware, unlawful mass picketing of Texaco's plant occurred during this same period. And, anonymous threats of violence were the order of the day during this period for local businessmen who were supplying Texaco and its non-Union contractor.

Finally, let us look to the nature of an informal settlement agreement. Certainly, you do not have to be reminded that there is absolutely no effective means to enforce an informal settlement agreement in the event of violation thereof. And, in view of all the factors and circumstances noted above, Texaco does not feel that a strong case can be made for mere reliance on the bona fides of the respondent Unions with respect to compliance with any such agreement.

In connection with the last noted point, Texaco believes it sifnificant to note that the respondent Unions with which the Regional Director proposes to effect informal settlement agreements are not naive first offenders in the area of the unlawful secondary boycott. To the contrary, we are here concerned with "old hands" at the business of unlawful threats and picketing, who obviously are not deterred from such unlawful inclinations even by Board Orders [See Lafayette Building & Construction Trades Council, 132 NLRB 673, 48 LRRM 1406 (1961)].

In the circumstances, it can only be reiterated that Texaco is frankly shocked that the Regional Director--who is completely familiar with and aware of all of the above noted

factors and circumstances--would even consider resolution of the subject cases by informal settlement agreements, even if he possessed the authority to do so. Further, since it must be assumed that the Regional Director is aware of the decision of the Court in the Leeds & Northrup case which clearly delineates his lack of authority to take the action which he proposes to take, Texaco can only conclude that the Regional Director is knowingly proposing to engage in what the Court characterized therein as "arbitrary and capricious" action which "would usurp the statutory authority of the Board".

As a matter of interest, it is felt that one further point should also be made. Aside and apart from the matters noted above, examination of the terms of the informal settlement agreements which the Regional Director proposes to effectuate in the subject cases clearly reflects the patent inadequacy thereof. Thus, the proposed agreement as to the respondent Lafayette Building & Construction Trades Council only obligates the Council not to "engage in, or induce, or encourage employees of Texaco Inc. to engage in a strike, or threaten, coerce, or restrain Texaco Inc.", whereas the Complaint alleges and the evidence on which it is based clearly shows that the Council's unlawful activity was not aimed solely at Texaco and its employes but was aimed at "other persons" as well. Texaco can only view this as a further illustration of the totality of the arbitrariness and capricousness of the Regional Director's proposed action with respect to the subject cases.

In conclusion, for the reasons set forth hereinabove, Texaco herewith renews its objection to the proposed action of the Regional Director and requests that you direct the Regional Director to forthwith proceed to Hearing on the Complaint heretofore issued in the subject cases. As noted at the outset of this letter, in directing such objection and request to you, Texaco does not in any manner waive the right to seek judicial recourse; nor does Texaco concede that an "appeal" to you is either the proper or the exclusive means to challenge the Regional Director's proposed action.

Respectfully submitted,

Signed: OLIVER J. BUTLER, JR

Oliver J. Butler, Jr.

OJBjr-CAF

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